United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

116

560

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,318

FOOD STORE EMPLOYEES UNION LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

NO. 22,414

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HECK'S INC.,

Respondent

and

FOOD STORE EMPLOYEES UNION LOCAL 347,
AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO,

Intervenor

SUPPLEMENTAL APPENDIX

INDEX

Ashland, Ky.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HECK'S INC.

and

Case No. 9-CA-3728

FOOD STORE EMPLOYEES UNION, LOCAL #347
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO

DECISION AND ORDER

On March 30, 1967, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief. 1/

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

1/ The Respondent excepts to the Trial Examiner's finding that the Union authorization card of employee Morris was properly authenticated, and, by motion incorporated in its brief, moves that the record be reopened and a subpoena be issued, requiring the Trial Examiner to appear and testify concerning his qualifications as a handwriting expert. The Respondent contends that failure to grant its motion should result in the rejection of Morris' card, inasmuch as Morris did not testify at the hearing and no other witness testified that he saw Morris sign the card.

After the hearing the parties stipulated that Morris was unavailable to testify, his whereabouts being unknown. The Trial Examiner (Section III, C, 3, b, 4 of his Decision), after comparing the purported signature of Morris on the Union authorization card with a specimen signature taken from the Respondent's payroll records, concluded that the card was signed by Morris, and found that such a comparison is a proper method of proving the authenticity of a signature (See footnote No. 29 of the Trial Examiner's Decision and the authorities cited therein). The Trial Examiner further found that it is proper to presume that the card was signed on the date shown thereon. (footnote No. 30 of the Trial Examiner's Decision).

We agree with the Trial Examiner's finding that Morris' card was properly authenticated. (See also, Combined Metal Mfg. Corp., 123 NLRB 895; Philamon Laboratories, Inc., 131 NLRB 80, enfd. 298 F. 2d 176, (C.A. 2)). In any case, we note that even without Morris' card the Union had a majority of employees in the appropriate unit when it made its recognition demand. Accordingly, as we find the Respodent's motion to reopen the record lacking in merit, it is hereby denied.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations[2/] of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Heck's Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C.

John H. Fanning, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

2/ We agree that the Respondent's polling of its employees was in the circumstances of this case violative of Section 8(a)(1) of the Act. Therefore, we find it unnecessary to rely on or adopt the Trial Examiner's additional or alternative grounds for that finding, as set forth in the last sentence of footnote No. 10 of his Decision.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

HECK'S, INC. 1/

and

Case No. 9-CA-3728

FOOD STORE EMPLOYEES UNION, LOCAL #347
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO

Cassius B. Gravitt, Jr., Esq., and
James K. Lawrence, Esq., for the
General Counsel.
Frederick Holroyd, Esq., Charleston,
W. Va., for Respondent.
Messrs. Sherwood M. Spencer and
Woodrow R. Gunnoe, Charleston,
W. Va., for the Charging Party.

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner: The instant charge was served upon Respondent on October 22, 1965, 2/ the complaint issued on December 16, and the case was heard on February 1, 1967. The issues litigated related to allegations of unlawful interrogation, threats of reprisal, creating the impression of surveillance, and unlawful refusal to bargain. After the hearing briefs were filed by Respondent and the General Counsel. On March 16, 1967, an order was issued proposing certain corrections in the record and the incorporation therein of certain exhibits, and disposing of certain other matters. No objection has been received to this order, and it is hereby affirmed. 3/

Upon the entire record, and my observation of the witnesses, I adopt the following findings of fact and conclusions:

I. The Business of Respondent

Heck's, Inc., herein called Respondent, is a West Virginia corporation, engaged in the operation of retail stores at various locations in the States of West Virginia and Kentucky. The Respondent annually has gross sales of more than $500,000, and annually purchases from out-of-State points goods valued in excess of $50,000. Respondent is engaged in commerce under the Act.

II. The Labor Organization Involved

Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, hereinafter called the Union, is a labor organization under the Act.

1/ Respondent's name appears as amended at the hearing.
2/ All events herein occurred in 1965, unless otherwise stated.
3/ In addition, it is now ordered (1) that Respondent's motions to strike appearing at pp. 24 and 28 of the transcript, as to which ruling was reserved at the hearing, are hereby granted, and (2) that Respondent's objection to evidence, which objection appears at page 100 of the transcript, and as to which ruling was reserved at the hearing, is hereby granted and the evidence objected to is hereby struck.

III. The Unfair Labor Practices

A. Issues

The pleadings, as amended at the hearing, raise the following issues:

1. Whether Respondent's president, Haddad, told employees on or about May 24, that he had discharged an employee when she admitted signing a union card?

2. Whether the interrogation of employees on October 8, by Respondent's operations manager, Darnell, violated Section 8(a)(1) of the Act or was privileged under the Board's Blue Flash doctrine?

3. Whether Respondent's assistant store manager, Mitchell, unlawfully created the impression of surveillance?

4. Whether Mitchell told an employee that another supervisor had been discharged because of the Union, and invited the employee to resign?

5. Whether Respondent's admitted refusal to recognize the Union violated Section 8(a)(5) and (1) of the Act?

B. Sequence of Events

Respondent operates a chain of discount stores in Kentucky and West Virginia. The instant case involves only its Ashland, Kentucky store.

The instant organizing campaign began early in 1965, and by October 8, the Union had obtained a number of signed cards from persons working in the Ashland store. On May 24, during the foregoing campaign, Respondent's president Haddad, addressed the assembled store employees, and, after telling them, in effect, that the signing of a union card would not immunize them from disciplinary action, cited an incident involving the discharge of an employee in another store who had volunteered to him the information that she had signed a union card. There was some conflict in the testimony at the hearing, which will be considered below, as to the precise reason given by Haddad for the discharge of that employee.

On October 8, Union Agent Spencer called Respondent's counsel, Holroyd, stated that he had obtained signed cards from a majority of Respondent's Ashland employees, and requested recognition. Holroyd suggested that Spencer write him a letter to that effect. On October 8, Respondent's operating manager, Darnell, asked virtually all the employees in the Ashland store, whether he (or she) wanted to be represented by the Union. In a letter of October 11, to Holroyd Spencer repeated the substance of the foregoing oral demand, offering to show Respondent the Union's cards. On October 13, Holroyd replied by letter, declining to recognize the Union because of an alleged ambiguity in the Union's definition of the unit, and because a poll taken by Respondent demonstrated that the majority of the Ashland employees did not wish to be represented by the Union. On October 25, Spencer again wrote Holroyd, renewing the Union's demand, but received no reply.

There was uncontradicted testimony by employee Clare that early in October, Assistant Store Manager Mitchell, an admitted supervisor, 4/ told her that Respondent knew which employees had signed, and which had not signed, Union cards, and that the Union had attained majority status when Clare signed a Union card (on October 6).

4/ The denial in the Respondent's answer of Mitchell's supervisory status was withdrawn at the hearing.

C. Discussion

1. Union animus

Respondent's union animus is amply attested by the Board's findings in 150 NLRB 1565 (Ashland store), 156 NLRB No. 73 (Parkersburg store), 158 NLRB No. 21 (Parkersburg store), 159 NLRB No. 104 (Huntington store), and 159 NLRB No. 127 (Huntington store). Perusal of these cases shows that at the foregoing stores Respondent reacted to a union organizational campaign by mounting a counteroffensive of interrogation and threats, did not hesitate to resort to discriminatory discharges, and that it consistently rejected requests for recognition. Thus, in 150 NLRB 1565, involving a campaign in 1964 by a different union (Retail Clerks) to organize the instant store, it was found that Respondent, through its president, Haddad, and operations manager, Darnell, engaged in extensive interrogation, that a supervisor threatened employees with discharge for union activity, and that an active union adherent was, in fact, discriminatorily discharged.

2. The 8(a)(1) issues

a. The Haddad speech

Riffe testified that on May 24, President Haddad told the assembled employees at the Ashland store that they could sign all the union cards they wished, but they still had to do their work, and that he then mentioned the case of a girl in Respondent's Parkersburg store who, after volunteering to him the information that she had signed a union card, had been "fired on the spot." Menshouse testified to the same effect, and Maynard corroborated this version with only the minor embellishment that Haddad asserted that the Parkersburg employee had "flaunted" the fact that she had signed a union card. While agreeing otherwise with Riffe, Clare testified that Haddad interpolated the explanation that the girl in Parkersburg had been discharged because she took the position, in effect, that, having signed a union card, she was free to neglect her work, and Carter testified to substantially the same effect.

All the foregoing employee witnesses were called by the General Counsel, and were apparently sincere. Their testimony may be reconciled on the assumption that Haddad, purposely or otherwise, cast his remarks in such a form that they were susceptible of different interpretations. Thus, if he stated, as Maynard testified, that the employees could sign all the Union cards they wanted, but still had to do their work, and, that he had discharged a Parkersburg employee for flaunting the fact that she had signed a union card, it was understandable that some of the employees, like Clare, would interpret the last remark, taken in context, as implying that the case of the Parkersburg employee was given as an illustration of Haddad's thesis that the signing of a union card did not relieve the employees of their obligation to do their job. However, if, as Menshouse, Riffe and Maynard testified, Haddad did not make it clear that the discharge of the Parkersburg employee was for any reason other than her avowal of union adherence, it was expectable that some, at least, of the employees would construe his remarks as implying, if not that all Union adherents would be summarily discharged, that Respondent, at the very least, would be quick to discharge Union adherents who gave it any offense. Moreover, in resolving the foregoing conflicting versions of Haddad's remarks, I deem it particularly significant, that Respondent, without offering any explanation at the time, failed to call Haddad to testify, notwithstanding that it was pointed out to Respondent's counsel at the hearing that such failure would invite the inference that Haddad's testimony would not aid Respondent. 5/

5/ In his brief Respondent's counsel asserts that he did not defend the allegation relating to Haddad's speech because of his understanding that it had been struck. However, at the close of the General Counsel's case I stated on the record that I was reserving ruling (Continued)

In view of this, I am constrained to find that, as indicated by the testimony of Menshouse, Riffe and Maynard, Haddad's remarks were couched in such a way as to lead his listeners to believe that adherence to the Union would subject them to reprisals, and that Respondent thereby violated Section 8(a)(1) of the Act.

b. Darnell's interrogation

Admittedly, Darnell on October 8, systematically interrogated all the employees in the Ashland store about their desire for Union representation. According to Darnell, he approached the employees in the store and read the following from a sheet of paper which he held in his hands:

> You are probably aware that the Food Handlers Union are (sic) trying to organize the store. They have made a demand of the Co. stating that they have a majority of our employees who desire them (the Union) to represent them. Do you want the Union to represent you? This will in no way have any bearing on your job. You do not have to answer this.

The sheet also listed the names of the employees and opposite this list were three ruled columns captioned, respectively "Yes," "No," and "Neutral." According to Darnell he indicated in one or the other of these columns the nature of each employee's reply to his question regarding their desire for union representation. 6/ He testified that the majority of the employees interrogated repudiated the Union, and the tally on the sheet, eliminating the answers of those found below to be supervisors, shows that only 12 favored the Union while 23 opposed it. The answers of three employees were not recorded. 7/ While three of the employees (Clare, Smith, and Menshouse) testified that Darnell's remarks to them corresponded to the foregoing quoted matter, Riffe testified only that Darnell asked her if she wanted to be represented by the Union, and Carter and Gates were specific that, in interrogating them, Darnell gave no assurance that their answers would not affect their jobs.

As I was favorably impressed by the demeanor of the latter three witnesses, and by the circumstantiality of their version of the interrogation incident, I credit them as against Darnell, and find that he offered them no assurance against reprisals.

Respondent contends that the foregoing interrogation was permissible under the Board's Blue Flash rule, 8/ which sanctions interrogation of employees about their desire for union representation, provided, inter alia, (1) that the purpose is to verify a union's contemporaneous claim to represent

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5/ (Continued) on Respondent's motion to strike that allegation, and in my order of March 16, 1967, that motion was finally overruled. On the same date I advised Respondent's counsel by letter that, if he deemed himself prejudiced by this ruling, I would entertain a motion to reopen the hearing to receive further evidence on the matter. No such motion was filed.

6/ The foregoing document was offered in evidence at the hearing as Respondent's Exhibit 1, but was received only for the purpose of showing what Darnell purportedly read to the employees. However, upon reconsideration, the document was by my order of March 16, 1967, received in evidence without any limitation, since the contents of the entire document were in effect, adopted by Darnell in his testimony.

7/ Darnell testified that he may have missed a few employees in making the round of the store.

8/ Blue Flash Express, Inc., 109 NLRB 591; Johnnie's Poultry Co., 146 NLRB 770.

a majority of the employees, (2) that such interrogation is accompanied by an assurance against any reprisals for union activity, and (3) that such interrogation does not occur in a context of employer hostility to union organization.

I am satisfied that none of the foregoing conditions was met here. As to (1), it is clear from Clare's undenied testimony, related in more detail below, that Respondent already knew on October 6, which employees had signed cards and that when Clare signed a card on that date the Union had achieved majority status, and there is no evidence that Respondent believed that such majority had been obtained by improper means. 9/ Accordingly, Darnell's polling of the employees was not necessary to verify the Union's claim, and it seems fair to infer that Respondent's only reason for taking the poll was the expectation that some of the Union adherents would be reluctant to admit their true sentiments to Darnell, even if they were given assurance against reprisals, and that the result of such a poll would, therefore (as proved to be the case here), be more favorable to Respondent than a count of the cards known by Respondent to have been actually signed. I do not believe that to permit such a "recount" by Respondent would conform to the letter or spirit of Blue Flash. 10/

As to the requirement of Blue Flash that the interrogation be accompanied by an assurance against reprisals, it has already been found that in the case of at least three employees Darnell neglected to convey that assurance.

As to the requirement of absence of union animus, it must be remembered that Darnell's interrogation occurred against the background of President Haddad's speech of May 24, in which, as found above, he cited the case of an employee whom he had discharged on the spot, when she announced that she had signed a union card. Although this speech had been delivered more than 4 months before the polling of the employees, such a dramatic threat to their job security by the top representative of management could not have failed to make a lasting impression on the assembled employees.

Moreover, it is relevant here to consider Respondent's union animus, as demonstrated by the Board's findings in the various cases cited above, particularly the Board's findings that in March 1964, at the instant store, both Haddad and Darnell engaged in unlawful interrogation, Respondent threatened discharge of all the union adherents, and did discriminatorily

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9/ In any event, since the record, including Darnell's own testimony, is devoid of any evidence that he asked any of the employees on October 8, about the methods used by solicitors for the Union to induce the employees to sign the cards, it is clear that Respondent had no concern on this point.

10/ Prior to Blue Flash, the Board had long held that systematic interrogation of employees about their union sentiments was unlawful as an invasion of their right to privacy and freedom from coercion. In Blue Flash, the Board balanced the mischief of such interrogation against the interest of the employees in verifying the accuracy of a union's claim to represent a majority of his employees, and struck a balance in favor of the employer. See Johnnie's Poultry Co., supra. However, where as here, there is ample basis for finding that the employer is already aware from other sources of the facts as to the Union's status, no legitimate purpose would be served by permitting him even the limited invasion of his employees' rights accorded by Blue Flash.

discharge, Menshouse, a prominent union protagonist; 11/ and, so far as appears from the record, such unfair labor practices were still unremedied on October 8. 12/ It is difficult to see how, under such circumstances, Darnell's poll could be deemed to meet the requirement of Blue Flash that such interrogation must not occur in a context of hostility to union organization.

It may be noted, finally, that, in finding interrogation of an employee to be coercive, the Board and the courts have frequently cited the fact that the employee falsely disclaimed any interest in union representation. 13/ Here, according to Darnell's own testimony the vast majority of the 38 Ashland employees disclaimed any desire for Union representation, even though, as found below, 21 of them had signed Union cards, and there is no evidence that any of them had prior to October 8, sought to revoke their cards.

For all the foregoing reasons, it is found that Darnell's interrogation violated Section 8(a)(1) of the Act.

c. The Mitchell-Clare incidents

Clare signed a Union card on October 6. She testified that early in October, she had discussions about the Union with Assistant Store Manager Mitchell, who told her that Respondent knew what employees had and had not signed Union cards, and that the Union had gotten "over the hump" and achieved majority status, when she signed a Union card. Mitchell did not testify. I credit Clare. A statement reflecting such precise knowledge of the number of Union adherents 14/ could not fail to create an impression of close surveillance by management of Union activities, through employee informers or otherwise. 15/ It is accordingly found that, by creating such an impression, Respondent violated Section 8(a)(1) of the Act.

11/ 150 NLRB 1565, enfd. 63 LRRM 2527 (C.A. 6, Nov. 1966).

12/ While Menshouse had been rehired by October 8, there was no evidence as to the extent to which Respondent had otherwise complied with the Board's order by that date.

13/ See e.g., 159 NLRB No. 104, at page 7 of the Trial Examiner's Decision (involving Respondent's Huntington store), which was affirmed on this point by the Board, where the variance between the result of an employee poll and the card count was cited as a reason for finding the poll coercive.

14/ Moreover, as found below, the Union did in fact get "over the hump" on October 6, when it obtained its 20th (and 21st) card. (Both Clare and Brown signed cards on that date.)

15/ While it is not clear from Clare's testimony whether this conversation took place before or shortly after the October 8 poll, it is evident that Mitchell was not referring to that poll as the source of Respondent's information regarding the Union sentiments of the employees. For one thing, that poll elicited repudiations of the Union from the vast majority of the employees, and it is not apparent, in any event, how Respondent could have determined from that poll the precise date on which the Union obtained the decisive card.

Respondent cites certain testimony by Clare to the effect that she and Mitchell were on friendly terms, that she "probably" initiated discussions of the Union with him, that she "might have" told him before the foregoing incident that she knew that most of the employees had signed Union cards; and that, on the occasion in question, she agreed with Mitchell's observation on this point. However, there is no evidence that Clare disclosed to Mitchell the identity of the Union adherents or that she herself had signed a card; and the fact that Mitchell and Clare were on friendly terms or that she initiated the discussions of the Union could not detract from the coercive effect of Mitchell's imputation to higher management of exact knowledge of the identity of the Union adherents.

Clare testified further that some time after Darnell's visit to the store on October 8, Mitchell referred to a rumor then circulating among the employees that Store Manager McCann had been "discharged" 16/ because of "the union and the employees," and that, in this connection, on a particular Saturday evening Mitchell told the witness that the employees and the Union had "shafted" McCann, and that the employees were not going to "shaft" Mitchell. As Mitchell did not testify, I credit Clare. It is apparent from the foregoing that Mitchell attributed the actual or supposed downfall of McCann to the extent of the employees' Union activity. Such a statement to an employee, implying, as it did, that management would not hesitate to discharge a supervisor for tolerating union activity, could not fail to impress upon such employee that those engaging in such activity might share the supervisor's fate. Accordingly, I find that Respondent thereby violated Section 8(a)(1) of the Act. 17/

The General Counsel alleged a further violation based on Clare's testimony concerning an invitation to her by Mitchell to resign her job. However, the most that can be made of Clare's rather confused testimony on this point is that, while this remark was made by Mitchell on the same evening that he referred to the "shafting" of McCann, the occasion for the remark was not Clare's Union activity or sentiments but a disagreement over an entirely different matter, unrelated to the Union, and that the very next day Mitchell apologized to her therefor. Accordingly, I find no violation here.

3. The 8(a)(5) issue

a. The appropriate unit

It was agreed at the hearing, and I find, that the following unit is appropriate for purposes of collective bargaining:

> All employees at Respondent's store in Ashland, Kentucky, excluding guards, professional employees, and supervisors as defined in the Act. 18/

16/ As McCann apparently continued as store manager at Ashland until November 1966, the foregoing discussion either must have occurred after that date, or must have been based on misinformation as to McCann's status.

17/ Had McCann in fact been discharged because of a permissive attitude toward the Union, such discharge would clearly have been unlawful. Talladega Cotton Factory, Inc., 106 NLRB 295, enf. 213 F. 2d 208 (C.A. 5); Jackson Tile Manufacturing Co., 122 NLRB 764, enf. 272 F. 2d 181 (C.A. 5); General Engineering, Inc., 131 NLRB 648. The rationale of these cases is that such a discharge tends to instill in employees the fear that they will suffer the same fate if they persist in their union activities. Such fear is nonetheless real, where, as here, the employees are told that their union activities caused the supervisor's discharge, whether or not that was actually the case.

18/ The original complaint provided for the exclusion of office clericals from the unit. The record shows that on October 8, Respondent had only one office clerical employee-Ruth Conley. (Cahal, who also worked in the office, was classified as a department head, and is found to be a supervisor.) Conley worked in a small enclosure in a corner of the store, where, among other things, she compiled records of cash receipts and processed employee timecards. Some time after October 8, she was transferred to the cosmetics department. At the hearing, the General Counsel moved to amend the complaint to include office clerks (Continued)

It was also agreed at the hearing, in conformity with the Board's finding in the prior case involving the instant store, 19/ that the six department heads at Ashland were supervisors, and that the night watchman at that store was a guard. They will accordingly be excluded.

b. The Union's majority status

At the hearing Respondent presented a document containing a list of 45 names, which were identified by McCann, the former manager of the Ashland store, as the names of all employees and department heads on the payroll for that store during the week beginning October 8. 20/ Of the foregoing persons, it was stipulated at the hearing that six, who were listed as department heads, were supervisors and that one who was listed as the "nightwatchman" was a guard. Of the remaining 38, there was a dispute at the hearing only as to Roger Davis, who was listed on the exhibit as a department head. The General Counsel also contended at the hearing that the list was incomplete. However, after the hearing, the General Counsel withdrew this contention, 21/ and Respondent indicated that it was satisfied that, as contended by the General Counsel, Davis was not a supervisor on October 8, but an employee. 22/ It follows that the parties are now in agreement, and it is found, that on October 8 and during the ensuing week the unit consisted of 38 employees.

At the hearing the General Counsel offered in evidence 30 signed Union authorization cards, which bore dates prior to October 8. 23/ One of these cards, signed by McGuire, was later withdrawn, another was rejected because signed by France, a supervisor, and the card of Colm is hereby rejected for the same reason. Of the remaining 27 cards, the record shows that 6 purport to bear the signatures of individuals who were not in Respondent's employ on October 8. There remain 21 cards, most of which are challenged in Respondent's brief on various grounds, as follows:

1. Twelve cards are challenged on the ground that the signatory did not testify at the hearing. However, these cards were properly authenticated by witnesses at the hearing, who attested to the signing of the card.

18/ (Continued) and Respondent stipulated to their inclusion. Under all the circumstances, I find that such inclusion was proper (Heck's, Inc., 159 NLRB No. 104; Ohrbach's, 118 NLRB 231; Taunton Supply Corp., 137 NLRB 221), particularly as it was agreed to by Respondent at the hearing (Cf. Heck's, Inc., 156 NLRB No. 73, fn. 17; Heck's, Inc., 159 NLRB No. 104, fn. 1).

19/ 150 NLRB 1565.

20/ Trial Examiner's Exhibit 1.

21/ Trial Examiner's Exhibit 2.

22/ Trial Examiner's Exhibit 3.

23/ An additional card, that of Linda Fields, bore the date of November 27, which was subsequent to the Union's demands for bargaining in October.

At a later point in the hearing, the General Counsel offered in evidence 19 new cards, of which 17 were shown to have been signed by persons employed in Respondent's Ashland store on various dates in January 1967. The General Counsel would add these cards to those already in evidence, and contends that there was a continuing demand by the Union, in January 1967, at a time when, as allegedly shown by such cards, the Union enjoyed majority status, and that such demand was rejected by Respondent for invalid reasons. However, in view of my ultimate findings below, there is no need to pass on this issue.

2. Criswell's card is contested on the ground that he was a department head. However, the record does not support this contention.

3. Clare's card is attacked on the ground that France, her department head, talked to her about the Union. While Clare initially acknowledged that, before she signed the card, she discussed the Union at some length with France, who expressed the view that it "would be a good thing" if the Union organized the employees, at a later point in her testimony she professed to be unable to recall whether France talked to her about the Union before or after she signed the card, and averred that she had little contact with him other than in connection with her work, as they were not "very fond of each other." She insisted, moreover, that she signed the card at the request of a Union agent, after discussing the pros and cons of union representation, and she denied that France's endorsement of the Union had any bearing on her decision to sign the card, explaining that she signed it because she "didn't like how things were," and she did not like France and how he "ran things." It thus appears that it was her resentment of France's conduct as a supervisor, rather than his endorsement of the Union, that impelled her to sign the card.

Moreover, in Aero Corporation 24/ in rejecting the contention that a card was invalid because solicited by a minor supervisor, the Board said:

> ". . . to permit Respondent now to rely on Johnson's activities to justify its refusal to recognize the Union designated by a majority of its employees, would encourage Respondent to have just such marginal supervisors join in the employees' organizing activity, secure in the knowledge that, if the Union should gain a majority, disclosure of the supervisor's real status would defeat that majority."

This rationale was specifically approved by the Court of Appeals in that case.

Under all the foregoing circumstances, it is found that Clare's card is valid. 25/

4. The cards of Wheeler and Morris were attacked on the ground that they were authenticated at the hearing only by specimens of their signatures taken from Respondent's payroll records. 26/ However, after the hearing the parties submitted a stipulation to the effect that Wheeler's card was signed by him on the date shown thereon, 27/ and, in view of this stipulation, no valid reason appears for rejecting his card. 28/ As to Morris, it was stipulated only that his whereabouts were unknown and that he was unavailable to testify. However, I am satisifed from a comparison of his purported signature on the Union card with the specimen referred to above that the card was signed by him. 29/ While there was no testimony

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24/ 149 NLRB 1283, 1287, enf. 363 F. 2d 702, 708 (C.A.D.C.).
25/ Radio Station KVEC, 93 NLRB 618, 623.
26/ Tax withholding certificates.
27/ See Trial Examiner's Exhibit No. 4 and my order of March 16, 1967.
28/ At the hearing, ruling was reserved on the admission of his card. It is hereby ordered received in evidence.
29/ As to the propriety of proving the authenticity of a union authorization card through comparison of the signature thereon with a specimen signature, see Aero Corporation, 149 NLRB 1283, 1285-1286, and 28 USCA Sec. 1731, which authorizes such comparison by Federal courts, without any limitation as to the conditions under which such comparison may be made. For common law authorities to the same effect, see Wigmore on Evidence, 3rd ed., sec. 2016 (fn. 1).

at the hearing that such card was signed on the date shown thereon (October 2), it is proper to presume the accuracy of that date. 30/

It is concluded therefore that on October 8, the Union had signed cards from 21 out of 38 employees in the unit, and that it represented a majority of such employees on that date.

c. The Union's request

Respondent contends that the Union did not make a proper request for bargaining. Union Agent Spencer testified that on October 8, he told Holroyd that the Union represented a majority of the "employees," whether or not department heads were included in the unit, and Spencer's letter of October 11 reaffirms the Union's claim to represent a majority of the "employees" in the Ashland store, regardless of the status of the department heads; 31/ and he there prognosticates, on the basis of his experience with Respondent, that the issue of the appropriateness of the Ashland unit would probably reach the Board, but he asserts that, no matter how the Board should rule on the department heads, the Union would still have a majority.

In his reply of October 13, Holroyd acknowledges that in their October 8 conversation, Spencer claimed to represent a majority of the "employees" in the store, and the letter continues:

> Pursuant to my questioning you stated that such majority existed with or without the department heads and you were making a demand to include the department heads or to exclude them depending upon what the Board decided in their case. This answer resulted in a very confused demand and we must therefore conclude that you did not demand recognition in an appropriate unit. 31a/

In his reply of October 25, to the foregoing letter, Spencer made it clear that he was presently defining the unit as either a store-wide unit including "non-supervisory department heads" or as one which excluded department heads. Spencer was thus, offering Respondent a clear, present choice between (1) a unit which included department heads, on the assumption that they were not supervisors, and (2) one which excluded them. Respondent contends that, because it was offered such a choice, Spencer's unit request was ambiguous. However, there was no ambiguity in Spencer's request in the sense that it was not clear what unit he was willing to bargain for. Each of the alternative units was precisely defined, and he made it abundantly clear that he was equally willing to bargain for either one. Essentially, the situation is the same as if Spencer had merely proposed the exclusion of supervisors, and indicated that he was willing to abide by Respondent's determination as to the supervisory status of the department heads.

30/ Wigmore on Evidence, 3rd ed., sec. 2520(b). While such presumption is rebuttable, there is no contrary evidence here; and, indeed, the only other evidence on the point is the notation made by Darnell on the sheet, on which he recorded the results of his October 8 poll (Respondent's Exhibit 1), indicating that Morris aligned himself on that date with the Union adherents. Such evidence is not only consistent with, but tends to confirm, the presumption that Morris signed a Union card on a date prior to October 8.

31/ In this letter and his subsequent letter of October 25, Spencer specifies the exclusion of the office employees. While the one such employee here involved has been included by me in the unit, it is well settled that such a slight variance is immaterial. See Heck's, Inc., 156 NLRB No. 73.

31a/ I do not credit the foregoing self-serving, hearsay version of Spencer's demand, insofar as it conflicts with his testimony.

Moreover, even if the Union had erroneously insisted on including the six department heads, it appears that the Board would not have deemed its bargaining request defective for that reason. 32/ It is not clear why the Union should be in a worse position, because it indicated indifference to the unit placement of the department heads. Respondent had no greater burden here than it had in the case just cited, involving its Parkersburg store. Here, as there, Respondent was required only to indicate in what respect it deemed the requested unit to deviate from the one it considered proper. Moreover, here unlike there, Respondent was assured that the Union would adapt its unit request to Respondent's views.

Accordingly, I find no fatal defect in the Union's bargaining request of October 8 or any of its subsequent requests.

d. The "good-faith" issue

Respondent offered no oral testimony at the hearing concerning the reason for its decision not to recognize the Union. Darnell averred only that the authority to make that decision was delegated to Respondent's labor relations adviser, Holroyd, who was also its trial counsel, and, although the Union called upon Holroyd to take the stand, he refused to do so. 33/ Accordingly, the only insight into Respondent's reason for refusing to recognize the Union is afforded by Holroyd's letter of October 13, which, after alleging that the Union's unit request was defective for the reasons noted above, continued as follows:

> Irrespective of this and in addition, we have caused a poll of all employees in that store to be conducted, the resulting answer produced an overwhelming statement that you did not represent the employees.
>
> Accordingly, recognition is declined until such time as you have been certified as the majority representative of the employees involved by the N.L.R.B.

It has already been found, on the basis of Darnell's uncontradicted testimony, that the result of this poll was in fact adverse to the Union. However, it has also been found that such poll did not conform to the requirements of the Blue Flash rule and was coercive. It is well settled that, in rejecting a union's recognition request, management may not, consistently with the requirements of good faith, rely on a count of union adherents obtained under coercive circumstances. 34/ Such a poll has the twofold vice that it is patently not a reliable measure of employee sentiment, and that it is calculated to deter the employees from remaining union adherents in the future. Accordingly, it is found that, by its resort to, as well as its reliance on, the foregoing poll, Respondent demonstrated its bad faith.

32/ Heck's, Inc., 156 NLRB No. 73, involving the Parkersburg store. There the Board found that a request for inclusion of as many as 5 employees out of a unit of 37 was not defective, even though the 5 were found ineligible. Here, there were, as found above, 38 in the appropriate unit.

33/ As the Union did not press the matter further, I had no occasion to rule on the propriety of such refusal. It is clear, however, that, if, as Darnell insisted, Holroyd was vested with sole responsibility for making such a decision regarding Respondent's labor relations policy as was here involved, he was subject to examination regarding his motivation to the same extent as any other representative of management, provided only that he could not be required to disclose any communications with his client that entered into the matter.

34/ Preiser Scientific, Inc., 158 NLRB No. 133, and cases there cited. Home Pride Provisions, Inc., 161 NLRB No. 47.

I am mindful of the Board's finding in 159 NLRB No. 104, involving Respondent's Huntington store, that in that case the polling of employees by management concerning their union sentiments, "while unlawful was not so flagrant that it must necessarily have had the object of destroying the Union's majority status * * * nor was Respondent's conduct of such a character as to support an inference that Respondent's refusal to bargain was made in bad faith in violation of Section 8(a)(5) and (1) of the Act."

However, here, unlike there, it was shown that Respondent was satisfied, even before taking the poll, that the Union had achieved majority status. Respondent, therefore, could have had no object in polling the employees on October 8, other than to coerce them into repudiating the Union. Thus, there is present here an essential element found to be lacking in the Huntington case--namely, coercive conduct which "necessarily . . . had the object of destroying the Union's majority status."

Moreover, even if this be viewed as a case where Respondent engaged in no unduly coercive conduct at the time of its refusal to honor the Union's request, it would still be found that such refusal was unlawful. Such a finding would be consistent with the Board's current policy as enunciated in John P. Serpa, Inc., 155 NLRB 99, Aaron Brothers Company, 158 NLRB No. 108, and H & W Construction Co., 161 NLRB No. 7. The net effect of these cases appears to be that, where there is no prior bargaining relationship, an employer, who is confronted with a request for recognition based on cards, need only refrain from any unfair labor practices "of such a character as to reflect a purpose to evade an obligation to bargain," and that, if this condition is met, the Board will not infer that his failure to recognize the union was in bad faith--i.e., because of rejection of the principle of collective bargaining. However, in the foregoing cases the Board imposed a limitation on the foregoing rule, which is especially significant here--namely, that, even if the foregoing requirement is met, an employer's refusal to recognize a union will still be found unlawful, if it affirmatively appears that he in fact entertained no doubt of the Union's majority status. 35/ Presumably, the rationale of this is that an employer cannot have a good faith doubt, if he had no doubt at all.

Here, there was affirmative evidence indicating that Respondent was aware on October 6, only 2 days before the Union's initial demand, -- that it had achieved majority status on that date. 36/ No attempt was

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35/ See particularly the discussion of this point in Aaron Brothers, supra, and H & W Construction Co., supra. See, also, Greyhound Terminal, 137 NLRB 87, enfd. 314 F. 2d 43 (C.A. 9); Snow & Sons, 134 NLRB 709, enfd. 308 F. 2d 687 (C.A. 9). While the foregoing cases dealt with an inspection of cards tendered by a union, no logical reason suggests itself why a different result should apply where the employer has ascertained the union's majority status from other sources. See Member Jenkins' concurring opinion in Aaron Brothers, wherein he states that an unlawful refusal to bargain may be proved, inter alia, "by independent knowledge of the employer that a union has a majority."

36/ The last 2 of the Union's 21 valid cards were in fact signed on October 6. Thus, Mitchell's aforenoted statement to Clare that Respondent knew that the Union had obtained the decisive card when she signed one (on October 6) was factually correct on the assumption that she was the first to sign on that date. In any case, it suffices that Respondent knew by October 8 that the Union had a card majority.

made to dispute this evidence, 37/ and on the basis thereof it has been found that on October 6 Respondent was in fact aware of the Union's majority status. Accordingly, on that ground alone, it would be consistent with current Board policy to find that Respondent's refusal to recognize the Union was unlawful.

Respondent contends, finally, in its brief that it was justified in refusing to bargain because of a letter dated October 1, received by Darnell, which read as follows:

> Mr. Fred Haddad, President
> Tri-State Distributors Inc.
> 19th Street
> Nitro, West Virginia
>
> Dear Mr. Hadad:
>
> This is to notify you that Retail Clerks Union Local 1059 has interest in your Hecks Inc. store located 3503 Winchester Avenue, Ashland, Kentucky, therefore, we hereby inform you that any agreements with any other Labor Organization would be in contradiction to the above stated interest and we will take all necessary legal action to protect such interest.
>
> Please contact the undersigned in the event you have any questions concerning this matter.
>
> Sincerely,
>
> William E. Harvey, President
> Retail Clerks Union Local 1059
> 187 South High Street
> Columbus, Ohio 43125

Admittedly, Respondent did not reply. The foregoing letter was not authenticated as having been in fact sent by Retail Clerks. Moreover, there was no testimony that such letter motivated Respondent's refusal to recognize the Union, and, significantly, Holroyd's letter of October 13, although purporting to detail the reasons for Respondent's refusal to recognize the Union, makes no mention of Retail Clerk's alleged "interest."

In addition, although a number of employees had signed cards for Retail Clerks as late as March 1964, 38/ Menshouse testified, without contradiction, that no representative of the Retail Clerks had appeared at the Ashland store since the latter part of 1964, which was several months before the Union began its organizing campaign, and nearly a year before the Union's bargaining requests. While in the case last cited, Retail Clerks filed, inter alia, a refusal-to-bargain charge, that charge was either withdrawn or dismissed before the hearing held in that case on July 14, 1964; and, so far as appears from the record, the only basis for Retail Clerks' claim in the October 1 letter that it had an "interest" in the Ashland store

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37/ Respondent did not even call any representative of higher management to deny that Respondent had the knowledge of the Union's majority status imputed to it by Mitchell. This circumstance, in itself, warrants the inference that such imputation was correct.

38/ See the findings in Heck's, Inc., 150 NLRB 1565.

were the cards dating back to March 1964, and the outstanding order of the Board issued in that case on February 5, 1965, requiring Respondent to refrain from discouraging, or interfering with, employee activities on behalf of Retail Clerks. 39/

While the Board has held that, when he is confronted with competing claims by two rival unions, which give rise to a real question concerning representation, an employer need not, and, indeed, may not, recognize either one, 40/ there was here no demand by Retail Clerks for recognition or any claim to represent the employees, but only a vague assertion of an "interest" in the employees, and a caveat against negotiating any contract with the Union, and Respondent admittedly made no effort to obtain clarification of the Retail Clerks' foregoing ambiguous position. In view of these circumstances, as well as the absence of any competent evidence that the foregoing letter was actually sent by Retail Clerks, that Respondent's refusal to recognize the Union was prompted to any extent by that letter, or that Retail Clerks had any valid authorization cards on October 1, it is found that Respondent's reliance on that letter is misplaced. 41/

39/ That order was enforced by the Court of Appeals on November 29, 1966, 63 LRRM 2527 (C.A. 6).

Respondent cites Blade-Tribune Publishing Co., 161 NLRB No. 137, apparently as authority for the continuing vitality of the Retail Clerks' 18-month old cards. However, that case is clearly distinguishable, as it holds merely that, when an organizing campaign is interrupted by the processing of unfair labor practice charges and thereafter resumed by the same union, culminating in a demand for recognition, a card signed before such interruption may be regarded as still valid, even though over a year old. Here, there was no resumption of the organizing campaign by Retail Clerks at any time after its apparent suspension or abandonment late in 1964, nor any subsequent demand by that union for recognition. This difference in the factual setting of the two cases is of prime significance. For, in Blade-Tribune the employer was in essence attempting to avoid its bargaining obligation by relying on the disruption of a union's organizing campaign through its own unfair labor practices. Policy considerations were clearly opposed to the employer's position and required that the otherwise stale cards be validated, so that the employer might not profit by his own wrong. Here, on the other hand, Respondent would profit by its own wrong if it were allowed to rely on Retail Clerks' 18-month old cards as a reason for not bargaining with the Union, since the only basis for validating such cards would be Respondent's own unfair labor practices in 1964. Whether the result here reached would be prejudicial to Retail Clerks is speculative, as there is no evidence that it intended to, or did, renew its campaign at any time. There can be no doubt, however, of the prejudicial effect on the employees' interest in self-organization, if Respondent's contention is sustained, as they will then be denied the right to representation by a union to which they adhered in the face of Respondent's unremedied unfair labor practices.

40/ The Boy's Market, Inc., 156 NLRB 105, 107.

41/ Boy's Market, Inc., supra. The Board there held that the refusal to recognize a union is not excused by a rival union's claim which is "clearly unsupportable or specious, or otherwise not a colorable claim." Here, not only was there no substantial basis for Retail Clerks' claim, but the fact that Holroyd's letter of October 13 does not even advert thereto is persuasive that Respondent recognized the speciousness of such claim. See, also, Essex Wire Corp., 130 NLRB 450.

It is therefore concluded that, by refusing to recognize the Union on and after October 8, Respondent violated Section 8(a)(5) and (1) of the Act.

IV. The Remedy

It having been found that the Respondent violated Section 8(a)(1) and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that the Respondent refused to bargain in good faith with the Union, which represented a majority of the employees in an appropriate unit. Accordingly, I shall recommend that the Respondent be ordered to bargain, upon request, in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

V. Conclusions of Law

1. All employees in Respondent's Ashland, Kentucky, store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times material the Union has been and still is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

3. By refusing since October 8, to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By interrogation of employees about their Union activities, threatening reprisals for such activities, and creating the impression of surveillance thereof, Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

RECOMMENDED ORDER

Upon the entire record in the case, and the foregoing findings of fact and conclusions of law, it is recommended that Respondent, Heck's, Inc., Ashland, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain concerning rates of pay, wages, hours of employment, or other conditions of employment with Food Store Employees Union, Local #347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees in its Ashland, Kentucky, store, including office clerks, but excluding professional employees, guards, and supervisors as defined in the Act.

(b) Coercively interrogating employees about their union activities, threatening reprisals for such activities, and creating the impression of surveillance thereof.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos to Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with Food Store Employees Union, Local #347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees of the Respondent, in its Ashland, Kentucky store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment or other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its store in Ashland, Kentucky, copies of the notice attached hereto marked Appendix. 42/ Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith. 43/

Dated at Washington, D. C.

Sidney Sherman
Sidney Sherman
Trial Examiner

42/ In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

43/ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDATIONS OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL bargain in good faith, upon request, with FOOD STORE EMPLOYEES UNION, LOCAL #347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below in respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

> All employees at our Ashland, Kentucky store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT coercively interrogate our employees about their union activities, threaten reprisals for such activities or create the impression of surveillance thereof.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form join or assist FOOD STORE EMPLOYEES UNION, LOCAL #347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos to Section 8(a)(3) of the Act.

HECK'S, INC.
.....
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407 Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 684-3663).

Charleston, W. Va.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HECK'S INC.

FOR RELEASE MORNING PAPERS

and

Cases Nos. 9-CA-3356
3477

JUL 5 1967

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On November 30, 1965, Trial Examiner Thomas F. Maher issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of these allegations. Thereafter, the General Counsel filed limited exceptions to the Trial Examiner's Decision with a supporting brief, and Respondent filed limited exceptions.

On March 23, 1966, the Board entered an order reopening the record and remanding the proceeding to the Regional Director for further hearing before the Trial Examiner to receive evidence from the parties concerning the nature and appropriateness of the bargaining unit, the majority status of the Union, and the alleged refusal of the Respondent to bargain with it.

On March 28, 1967, the Trial Examiner issued his Supplemental Decision, in which, on the basis of the evidence adduced at the reopened hearing, he found that Respondent had engaged in certain unfair labor practices, and recommended that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Supplemental Decision. The Respondent filed exceptions to the Trial Examiner's Supplemental Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated

166 NLRB No. 38

its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearings and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Supplemental Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified.[1/]

ORDER[2/]

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Heck's Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, activities, or desires.

(b) Threatening their employees with reprisals if they select the Union as their representative.

1/ Contrary to the Trial Examiner, we find that during the period when Ivan Vickers was employed at Respondent's Nitro store warehouse, he was not a supervisor. Although nominally in charge of shipping, Vickers worked under either Foy, the warehouse manager, or Graley, the assistant warehouse manager; his authority to direct other warehouse employees was limited to using warehouse employees who were not otherwise occupied to assist him. In loading and unloading merchandise, Vickers worked alongside the other employees with no authority to hire, fire, or discipline. Moreover, although Respondent's policy was to pay its supervisors on a salary rather than on an hourly basis, up to one month prior to his leaving the job for the Air Force, Vickers was paid an hourly rate with no greater benefits than those received by other warehouse employees. Further, we note that at the hearing, in response to a question as to who were the supervisors at the Nitro warehouse, Graley replied that they consisted of himself and Foy; he failed to mention Vickers.

The Trial Examiner inadvertently excluded employee James Goins from the unit. With the inclusion of Goins and Vickers, the bargaining unit consisted of 26 rather than 24 employees on October 9, 1964, when the Union sought recognition. The record is corrected accordingly.

On Page 6, line 37 of the Trial Examiner's Supplemental Decision, the date October 12 is corrected to read October 13.

2/ In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order" the words "a Decree of the United States Court of Appeals, Enforcing an Order."

(c) Offering or granting their employees wage increases and/or promotions in exchange for their opposition to the Union.

(d) Discharging or otherwise discriminating against employees in respect to hire and tenure of employment for the purpose of discouraging union membership or concerted activities.

(e) Refusing to bargain with Chauffeurs, Teamsters and Helpers Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of employees in the following appropriate unit:

> All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans, and Charleston warehouses, excluding office clericals, guards, professional employees, and supervisors as defined in the Act, and all other employees.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found to be appropriate and, if an agreement is reached, embody such an understanding in a signed agreement.

(b) Offer James Goins immediate and full reinstatement to his former or substantially equivalent position, and make him whole for any losses he may have suffered, together with 6 percent interest thereon, in accordance with F. W. Woolworth Co., 90 NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716.

(c) Notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records relevant and necessary to the determination of backpay due and the reinstatement provided under the terms of this Order.

(e) Post at its Nitro, St. Albans, and Charleston, West Virginia, stores and warehouses, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 10 days from the date of this Decision, what steps have been taken to comply herewith.

It is further ordered that so much of the complaint in this proceeding as alleges unlawful discrimination against Ivan Vickers, be, and it hereby is, dismissed.

Dated, Washington, D. C.

Frank W. McCulloch, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for opposition to the aforesaid Union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid Union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered.

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

WE WILL, upon request, bargain collectively with CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of all the employees in the bargaining unit described below, concerning rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is

All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans, and Charleston warehouses, excluding office clericals, guards, professional employees, and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named Union, or any other labor organization.

HECK'S INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407, Federal Office Building, 550 Main St., Cincinnati, Ohio 45202 (Tel. No. 684-3686).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

HECK'S, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Cases Nos. 9-CA-3356, 3477

ERRATUM

Through inadvertence the words "where ineligible employees" were used on page 10 line 10 of the Trial Examiner's Decision in this matter. For them there should be substituted the following words: "wherein eligible employees."

Thomas F. Maher
Trial Examiner

Dated: December 2, 1965.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

HECK'S, INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Cases Nos. 9-CA-3356, 3477

William C. Mittendorf, Esq., of Cincinnati, Ohio, for the General Counsel.
Gardner, Gandal & Holroyd, by Fredrick P. Holroyd, Esq., of Charleston, W. Va., and George V. Gardner, Esq., of Washington, D. C. for the Respondent.
Pottenbarger & Bowles, by Martin C. Bowles, Esq., of Charleston, W. Va., for the Charging Union.

Before: Thomas F. Maher, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

Upon a charge and an amendment thereto filed on October 23 and December 4, 1964, and a second charge filed on February 15, 1965, by Chauffeurs, Teamsters and Helpers Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for the Ninth Region of the National Labor Relations Board, herein called the Board, issued a consolidated complaint and an amendment thereto on behalf of the General Counsel of the Board against Heck's Inc., Respondent herein, alleging violations of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C., Sec. 151, et seq.), herein called the Act. In its duly filed answer Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practice.

Pursuant to notice a hearing was held before me on June 28 and 29, 1965, at Charleston, West Virginia, where all parties were represented by counsel and afforded full opportunity to be heard, to present oral argument and to file briefs with me. Although the parties were specifically invited to file briefs with me on the issue of refusal to bargain presented herein, only Respondent complied.

Upon consideration of the entire record, including Respondent's brief, and upon my observation of each witness appearing before me, I make the following:

Findings of Fact and Conclusions of Law

I. The business of the Respondent

Heck's Inc., Respondent herein, is a West Virginia corporation engaged in the retail sale of merchandise, including ready-to-wear clothing, sporting goods, hardware, household goods, toys and cosmetics at various locations in the States of Kentucky and West Virginia, including Ashland, Kentucky, and Huntington, Parkersburg, Nitro, St. Albans and Charleston, West Virginia. It is stipulated that during the 12-month period ending in May 1965 Respondent, in the course and conduct of its business operations, had a gross volume of retail sales in excess of $500,000, and purchased directly from points outside the State of West Virginia and had shipped directly to it in West Virginia goods and products valued in excess of $50,000. Upon the foregoing I conclude and find that Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

It is conceded and I accordingly conclude and find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The issues

1. The discrimination against James Goins.

2. The supervisory status of Ivan Vickers.

3. The failure of Vickers to use due prudence in seeking reinstatement.

4. Respondent's threats to and interrogation of employees.

5. The failure of proof as to the appropriateness of the bargaining unit.

IV. The unfair labor practices

A. Sequence of events

1. The Union demand for recognition and Respondent's refusal

In the Charleston, West Virginia area, and specifically in Charleston itself, and nearby Nitro and St. Albans, Respondent operated discount department stores, each with its own warehouse, separately supervised and manned with its own distinct work force. Early in October 1964 some of these warehouse employees developed an interest in the Union, sought out the Union's business agent, Robert Jackson, and obtained from him instructions on organizing the employees together with a supply of blank authorization cards. Prominent in this initial activity were Employees James E. Goins and Virgil R. Searls, and Ivan L. Vickers, whose supervisory status is in issue. By October 5, 13 cards authorizing the Union to represent them had been signed by employees in the three warehouses and submitted to Jackson. The signers and their designated occupations were

Charles D. Curry	Receiving and Shipping Clerk
Charles G. Ferrell	Warehouseman
James E. Goins	Laborer
Edward L. Hughart	Warehouseman
Richard Johnson	Truckdriver
Franklin T. Lanham	Laborer
James A. May	Laborer
Opie G. Nelson	Warehouseman
Samuel D. Nelson	Warehouseman
Virgil R. Searls	Warehouseman
Doyle Thornton	Warehouseman
Ivan L. Vickers	Shipper
Larry Woodall	Truckdriver-Warehouseman

Thereafter, on October 10, Everett Nichols, Warehouse Clerk, signed an authorization card, and on October 13 Anna L. Adkins, a Cosmetics Pricer, did likewise.

On the afternoon of Friday October 9 Jackson met with Respondent's president, Fred Haddad, and informed him that a majority of employees having signed up with the Union he was requesting recognition of the Union for the truckdrivers and warehousemen employed at the warehouses in Nitro, Charleston and St. Albans. In support of his claim and request Jackson presented the cards to Haddad who inspected each one in turn. After expressing surprise at the identity of some of those who had signed the cards and some consultation with Personnel Manager Ray Darnell he suggested going through the warehouses and talking with the men involved. This idea was vetoed by Jackson. 1/ Haddad then sent for Ivan Vickers whose card was among those in the pack and, showing him the card, asked him if he had signed it. Vickers replied that he had. Whereupon Haddad directed Vickers to return to work.

During the course of the conversation generated by Jackson's request for recognition he indicated, as noted above, that it was for the warehouses at Nitro, Charleston, and St. Albans. At this point Haddad informed him, according to Jackson, "that he also had stores in Huntington and Parkersburg, West Virginia, and Ashland, Kentucky, each of them having warehouses," but Jackson persisted in his original request for a unit limited to the local warehouses and expressed a willingness to limit the scope of the unit further. 2/ Jackson added that "there was some discussion of the clerks and all and I informed him that there was no request for recognition of the clerks, that we did not historically negotiate for clerks." Haddad refused Jackson's several requests for recognition and negotiation of a contract, stating each time, "No comment."

1/ The foregoing is the credited testimony of Jackson. President Haddad denied having seen the cards, testifying that he only looked at the top one, Vickers', and then after "flipping through them" without looking at them he handed them to Personnel Manager Darnell whom he had meanwhile summoned to the meeting. Darnell was not questioned concerning this. I do not accept Haddad's uncorroborated denial that he saw these cards, contradicting as it does Jackson's credited account of the incident. Moreover, Employee S. D. Nelson corroborates Jackson to the extent that Haddad inspected the cards. Thus he credibly testified that Haddad told him that "the union representative had been there and showed him cards signed by the employees of Heck's" and that when Haddad saw Nelson's name "he almost passed out."

2/ Ivan Vickers credibly testified that at an employee meeting later the same day Haddad stated he did not believe the Union could win an election because the warehouses of all five stores would be involved.

Thereafter on October 12 or 13, in the course of a conversation with Haddad concerning the reinstatement of a recently discharged employee (infra, p. 5) Jackson again asked for recognition and bargaining and Haddad again refused.

2. Interference, restraint and coercion of employees

Immediately following Haddad's conference with Jackson on October 9, Warehouse Manager Roy Foy called a meeting of the warehouse employees. Haddad addressed the group on this occasion telling them he was surprised at their selection of the Union and asking them as a group what it could do for them, pointed out to them the things he could do regardless of unionization. Thus he explained that he did not have to guarantee a 40-hour week, and that he could require the men to work split shifts. He then singled out an employee in the group, Charles Lewis, and asked him if he had signed a Union application. Lewis replied that he had not. Haddad concluded his remarks by assuring the employees that anyone could withdraw from the Union if he wished and that Respondent would not discharge anyone for joining. 3/

On the next day, October 10, Harry Turner, also know as Junior Turner, Department Head of Houseware at the Charleston store, drove to the Nitro warehouse, sought out Employee S. D. Nelson and invited him to his car in the parking lot where the two talked, at some length. In the course of this conversation Turner asked him to verify the fact that he and another employee, Woodall, had joined the Union. According to Turner himself, whom I credit, he said:

> We got to talking about the union. I got to telling him the good points that we had at the store and what the company could do if they wanted to. They didn't have to give us the bonus and they didn't have to have these parties for us and stuff like that. I was explaining the good points to him about it.
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> * * *
>
> Q. Did you make any threats or promises to him as to what would happen if he did or did not join the union?
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> A. I told him what could happen. The company could cut our raises off, cut it off short, and stuff like that. It was to your own advantages. And our vacations.
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> * * *

3/ When Personnel Manager Darnell addressed the meeting, he stated that FMC, a local industry, was in the midst of a strike, and if it were forced to move out of town Respondent's business would suffer. Counsel for General Counsel contends that this statement on the part of Darnell supports an allegation in the complaint (Par. 5(b)(i)) that the statement, coupled with another to the effect that unionization of Respondent's operations would reduce its discount potential and business, constituted an unlawful threat. There is nothing in the record to indicate that Darnell made any reference to the reduction of Respondent's discount potential.

Actually it was Warehouse Manager Foy, according to Goins, who made the statement in question, specifically that Heck's could not operate with a union and continue as a discount house. At the hearing counsel for the General Counsel was apprised of the fact that the complaint contained no allegation of statements attributable to Foy, an admitted supervisor, and he replied that "this does not go directly to any allegation of the complaint." Under such circumstances, I believe that Respondent was relieved of an obligation to refute the statement or to otherwise litigate the issue. Accordingly, I will not consider the Foy statement in any conclusion I make herein.

Q. Did you tell Mr. Nelson that if the union was voted in that the company would discontinue granting bonuses or reduce the work hours of the employees?

A. No.. I said they could.

Q. Did you tell Mr. Nelson that you knew that he and another man, Mr. Woodall, had signed union cards for the union?

A. Yes, sir.

(Tr. 207-209)

A week later, on October 17, Employee S. D. Nelson had another significant conversation, this time with President Haddad who summoned him to his office. After telling Nelson he had seen his union card among those presented by Jackson (supra) Haddad offered him a salaried job of $325 per month if Nelson would help "break up the union in the St. Albans store." When Nelson refused Haddad then asked if he believed he was due for a raise. Nelson expressed doubt because of his union activity whereupon Haddad sent for Personnel Manager Darnell and the two of them checked out a list and stated their conclusion that Nelson was not due for his raise. Then Darnell said, "I wished that you could be on our side." 4/

A week later, on October 23, Haddad made the same proposition to Ivan Vickers who, unlike Nelson, accepted it. Haddad sent for Vickers and in the presence of Personnel Manager Darnell and Merchandise Manager Ellis complimented him upon his work and said he wanted to make a "deal" with him. The "deal" was to put Vickers on a $350 per month salary to help break up the Union by exerting his influence over his fellow workers. 5/

The foregoing statements and incidents portray a pattern of interference, restraint and coercion of employees. Thus Respondent, through its officials and supervisors, in reprisal for the employees joining the Union, threatened to cut this workweek, and, tantamount to a threat in each case, stated that it could withdraw bonus payments, eliminate company parties and cut off raises. Similarly, and during the same period it publicly interrogated Employee Lewis concerning his union membership, and sought to bribe Employee S. D. Nelson to work against the Union. 6/ Citation of authority is unnecessary to establish that such conduct violates Section 8(a)(1) of the Act and I so conclude and find.

3. The discharge of James Goins

On the following morning, Saturday, October 10, Employee James Goins was assigned the duty of washing down the warehouse driveway with a fire hose and in the course of it became water soaked to an extent that is in serious dispute. Goins testified he was "sopping wet" from the shoulders down, as the consequence of wielding a leaky nozzle. Ivan Vickers testified

4/ The credited testimony of Employee Nelson. Neither Haddad nor Darnell denied the conduct or statements attributed to them.

5/ The credited testimony of Vickers. Ellis was not questioned about the incident. Haddad and Darnell both corroborate the details of Vickers' transfer to salary status, and Haddad denies any reference was made to the Union. I do not accept Haddad's denial. Darnell testified simply that nothing was said about the Union "to his recollection." I do not accept this as a denial on his part.

6/ In view of my finding that Employee Vickers is a supervisor (infra) I make no finding as to whether the successful bribing of him for the same purpose is violative of the Act.

merely that he was wet, whereas Goins' supervisor, Graley, testified that Goins' clothing was wet for a distance of 18 inches above the floor. 7/ A synthesis of the testimony does establish, then, that Goins was wet and that his request to go home had factual justification. Whereupon, having requested and obtained Supervisor Foy's permission to leave, he did so. Upon his return on Monday, October 12, Goins found his timecard missing from the rack. He questioned Foy who first told him that he had left on the previous Saturday without permission and then stated that his work had been unsatisfactory during his 90-day probation period and that they were going to have to let him go.

The foregoing findings are based on the credited testimony of Employee Goins. I do not accept Supervisor Graley's testimony as credible, having observed him on the witness stand. Throughout his testimony he was hesitant and evasive, and on a number of occasions completely confused, all to such an extent that he inspired no confidence whatever in his testimony respecting Goins. As an example of Graley's confused testimony I would cite his insistence that he knew nothing at all about the Union campaign. It had been credibly testified to by both Goins and Vickers without contradiction, however, by any of Respondent's witnesses that President Haddad had called an employee meeting on October 9, following Jackson's request for recognition, and that Darnell and Graley were present and had spoken to the men. Under such circumstances Graley's professed ignorance of Union matters cannot be accepted. Accordingly I reject all of Graley's testimony, and particularly his testimony that he smelled alcohol on Goins' breath on several occasions, and that this was why he reported him to Foy on Saturday, October 10. Not discounting the possibility that Goins may well have exuded an odor comparable to alcohol, which could have been anything from bonbons or beer to mouthwash, Graley did not impress me as one capable of making a refined judgment in such matters. Judging from the manner in which he conducted himself when confronted with questions concerning this subject on cross-examination, indeed a complete unwillingness to give a straight-forward answer, I conclude and find that his story was a fabrication.

I can give no more credence to the report as it comes from Personnel Manager Darnell, who approved Goins' discharge. Thus Darnell testified that Supervisor Foy, in reporting the details of the entire incident to him, included Graley's report that he had smelled alcohol on Goins' breath. Darnell's testimony becomes, at best, hearsay twice removed,--and specifically, hearsay whose source I reject at the outset. I accordingly reject any suggestion in the record that Goins was ever known to have indulged in alcoholic beverages to excess or that he had the odor of such on his breath. 8/

Upon the foregoing facts and conclusions certain other conclusions emerged. Thus it appears that Goins, who had permission to leave was discharged (1) for leaving, (2) for unsatisfactory performance that was unsubstantiated on the record, and (3) inferentially for conduct, if such

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7/ Dependent upon the length of the leg involved this would place the high water mark somewhere between Goins' calf and knee.

8/ It is significant to note that Goins testified credibly that he does not drink, and that Foy, the supervisor who discharged him, has himself been discharged and cannot be located to testify.

we may classify bad breath, that was never proven. Occurring as it did on the day following the Union's request to bargain after which Respondent's officials engaged in conduct which I have found to constitute unlawful interference, restraint and coercion I have no hesitation in concluding that Foy, the missing supervisor, with Darnell's knowledge, dismissed Goins for the reason that he was known, by Haddad's inspection of union cards, to be a member of the Union and, by the proximity in which he worked with such supervisors as Graley and Foy, to be the one who was soliciting Union memberships.9/ In so concluding I further find and conclude that the reasons suggested by Respondent, unsubstantiated and conflicting as they are, are but pretexts to mask Respondent's true purpose, its attempt to thwart the Union's campaign. Such conduct has consistently been held to constitute discrimination in violation of 8(a)(3) and (1) and I so find and conclude here.

4. The failure to reinstate
Ivan Vickers

Ivan Vickers, who has figured prominently in the Union activity described heretofore, is claimed by Respondent to be a supervisor. To this end it adduced considerable evidence in support of its contention, through testimony of President Haddad, Darnell, and Ellis. Moreover, Vickers himself testified that prior to his transfer to the Nitro warehouse he had been manager of Respondent's Lewis Street warehouse and while claiming he did not consider himself to be a supervisor at Nitro because he "wasn't in charge of the warehouse," he was told he was in charge of shipping and he did, in fact, assign warehouse employees to loading and unloading trucks and directed them in filling orders. He also attended supervisory meetings. Accordingly, based upon Vickers' own description of his duties as they existed both before and after his Nitro assignment, I conclude and find him to be a supervisor within the meaning of the Act.

On December 3, 1964, Vickers left Respondent's employ to enlist in the United States Air Force. Thereafter, on December 31 he was granted a temporary medical discharge from the service and immediately sought to return to Respondent's employ. He called Merchandising Manager Ellis who took his telephone number and assured him "he thought it would be fine" and would check with Personnel Manager Darnell. Ellis never called back and Vickers heard nothing further. Ellis' testimony lends confusion to the situation. Thus he stated that he either referred Vickers to Darnell or said he would check with Darnell, or that Vickers should come in and see them. Under such confused circumstances Ellis' testimony is of little value and I rely completely upon Vickers' account. Vickers was returned to his job in March upon the intervention of officials of the United States Veterans Administration. General Counsel alleges Respondent's refusal to recall Vickers during the intervening period to be discriminatory in violation of Section 8(a)(3) of the Act.

Common prudence would suggest that an employee do something more than make a telephone call to secure the reemployment rights due him upon return from military service. Here Vickers, by his own admission, did nothing more and was content to wait for the two or three months during which the governmental wheels turned sufficiently to obtain his job for him. Under these relaxed circumstances I am not disposed to equate Vickers' disinterest with a manifestation of Respondent's discriminatory motive. If, indeed, Respondent was disposed to discriminate against him, Vickers at least had the obligation to establish a case in his own behalf. Sitting upon any rights he may have thought he had is a far cry from this. I

9/ Wiese Plow Welding Co., Inc., 123 NLRB 616.

accordingly conclude and find upon the record made by Vickers himself that he was not being deprived of employment as a supervisor 10/ during the period in which he blithely waited for someone to return his telephone call. I therefore recommend that so much of the complaint as alleges discrimination against Ivan Vickers in violation of Section 8(a)(3) be dismissed.

5. The alleged refusal to bargain

It is clear from the testimony of Union Representative Jackson, General Counsel's own witness, that President Haddad questioned the scope of the bargaining unit when Jackson requested bargaining on October 9. Thus Haddad told Jackson he had warehouses other than the three whose employees' cards were presented him. In elaboration Jackson testified;

> Mr. Haddad said that he had warehouses in all his stores and as a result questioned the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in the stores.
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> (Tr. 35)

At this juncture none of the events which I have detailed above, and have found to constitute violations of the Act, had occurred. Under usual circumstances it would be appropriate to inquire, therefore, whether Haddad's refusal in this context was or was not a good faith doubt, particularly in view of his and associates' subsequent conduct. But these do not appear to be usual circumstances and it would seem that as there is so much confusion surrounding the identity and composition of the unit--as sought initially by Jackson, as understood by Respondent, and as urged by General Counsel--that the element of good faith refusal to bargain in a unit appropriate for bargaining need never be reached.

Jackson concededly requested bargaining in behalf of the drivers and warehousemen at the Nitro, St. Albans, and Charleston warehouses and three days later filed a petition for an election in the same unit. Nevertheless, as quoted above, he expressed a willingness at the time not to be bound by the scope of the unit he requested. 11/ General Counsel, on the other hand, in a consolidated complaint initially issued on April 22, 1965, alleged as the appropriate unit all truckdrivers and warehousemen at Respondent's Nitro warehouse and St. Albans store, with the usual exclusions, and by a June 3 amendment added to this unit the same classifications employed at Respondent's Charleston "store and warehouse." And finally by a document introduced into the record by counsel for the General Counsel entitled "Warehouse Employees" it is claimed that those employees listed thereon as Truck Drivers or Warehousemen at Nitro, St. Albans, and Charleston warehouses constitute the total eligibility list, plus Employee Goins who

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10/ Assuming, contrary to any conclusion herein, that the equities preponderated in Vickers' favor in this matter, it is well established that an employer may lawfully refuse to rehire a former supervisor who applies for a supervisory position. Pacific American Shipowners Assn., 98 NLRB 582, 596.

11/ Cf. Sportswear Industries, Inc., 147 NLRB 758, wherein the Board, at p. 760, stated:

> Once having defined the unit it claims to represent, and having made a demand on that basis, the Union has thereby established the frame of reference for measuring the validity of its demand. "Such a requirement imposes on the union representative only the obligation to say what he means. Failing to do so /the union/ cannot be considered as having made the sort of request to bargain which imposes upon an employer a legal obligation to comply" (footnote omitted).

had been discharged by that time (supra, pp. 5-7) and was therefore not on the list. For reasons which follow the total number of employees eligible for inclusion in the unit cannot be precisely determined.

It should now be noted that a distinction exists on the so-called eligibility list between "Drivers and Warehousemen" and other classifications such as "Pricer" and "Receiving Clerk," both of whom General Counsel explicitly stated he would exclude from the unit. This distinction becomes dim, however, at certain points and to such an extent that the terms "Warehouseman" and "Warehouse Employees" are used interchangeably. Thus when Jackson was asked by me to repeat precisely the unit for which he was seeking recognition he stated to me, "Truckdrivers and warehouse employees." And when counsel for General Counsel introduced what, upon refinement, becomes the eligibility list, he referred to it as "a list of the warehouse employees." While it is true that after considerable probing on my part the purpose of this list was clarified as being relevant only had it contained the names of all the drivers and warehousemen at the three designated warehouses, nonetheless it is significant to note that ambiguity certainly attended the proceedings at this point.

Upon further development of the evidence as to the appropriate unit other elements of confusion appear. Thus, although General Counsel stated specifically that Pricers "were not to be included in the unit," his own witness, Franklin T. Lanham, corroborated Personnel Manager Darnell's undenied testimony that the duties of the male Pricers differed little, if any, from those of "Warehousemen," the difference being that in addition to loading and unloading trucks and stocking shelves, as do Warehousemen, the Pricers also mark the merchandise. Female Pricers are not required to do the heavy work, it being performed by the Warehousemen.

Nor does the election petition filed by the Union on October 12, 1964, add clarity. Thus, while giving the several addresses of the Employer in one section of the petition form it describes the unit requested as "all employees of the Employer employed at its places of business as warehousemen and truckdrivers" (emphasis added).

Finally, as the hearing progressed and in the course of determining the unit eligibility of an employee in one of the warehouses (Anna Lou Adkins) counsel for the General Counsel was reminded that the employee whose card was being discussed was a "Pricer," the category previously excluded from the unit by counsel's earlier statement of position. In reply counsel stated to me:

> I am aware of that, sir. But I still have this problem of what the final unit determination is going to be.
>
> (Tr. 162)

And earlier in the record when asked by me to clarify the duties of an allegedly eligible employee to determine his inclusion as a Warehouseman counsel stated:

> I am aware of the problem you would have with this. But at the same time I am aware that we are concerned with the situation that the appropriate unit has not actually been determined as of this time.
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> (Tr. 135)

Upon the foregoing conglomeration of scanty data the Board, through me, is being asked to conclude that the Union represented the majority of the Respondent's employees in a unit appropriate for bargaining and that President Haddad's refusal to bargain, as detailed above, was not grounded in good faith either as to his doubt of the majority, or of the appropriateness or scope of the unit requested, or both.

Section 9 of the Act provides the framework for the laboratory conditions which the Board deems so essential for the determination of employee representation. Through appropriate rules of decision and its regulations 12/ procedures have historically been availed of to provide a forum to assess the duties of those sought in a bargaining unit, the extent of the unit's scope, and a myrid of complications that must be resolved to achieve a reasonable determination of the unit in which a fair election is to be held; all of this through the orderly participation and contribution of both employer and union representatives. Similarly in the conduct of the election itself, where ineligible employees are permitted the privacy of their choice, safeguards are provided in the form of challenge available to all parties to insure that eligibility is maintained and that irregularity is eliminated.

With all due respect to able counsel participating in this proceeding and with full recognition of my own procedural limitations I fail to see how the materials presented in evidence here provides an adequate substitute for the orderly procedure and determination customarily available.

The essence of this case is twofold: that Jackson claimed a majority in an appropriate unit, and that Haddad's refusal was or was not in good faith. As to the former, upon full consideration of evidence presented and the conflicts this evidence contains, I am persuaded that General Counsel has failed to meet the burden of establishing what precisely was the appropriate unit in which the Union had its majority. Failing in this respect and thus creating for me an unresolved doubt concerning the unit, I am not disposed to conclude that Respondent's refusal or its doubt was any less reasonable, particularly when this refusal rested, at least in part, upon the fact that Respondent had in its employ warehousemen not included in the unit requested.

Upon all of the foregoing considerations, therefore, I would recommend that so much of the complaint as alleges Respondent's refusal to bargain be dismissed.

V. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section IV, above, occurring in connection with its business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. The remedy

Having found that Respondent has engaged in unfair labor practices I shall recommend that it cease and desist therefrom and, because of the gravity of its conduct I shall also recommend that it cease and desist from infringing in any other manner upon the rights of employees guaranteed by Section 7 of the Act. 13/

12/ See Rules and Regulations, Series 8, as amended, Sec. 102.61 et seq.
13/ N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 433.

Affirmatively I shall recommend that James Goins, whom it discriminatorily discharged, be reinstated to his former or substantially equivalent position, if this has not already been done, without prejudice to seniority or any other rights and privileges, and that he be made whole for any loss of earnings suffered by him because of Respondent's discrimination against him, with backpay computed by access to the Company's books, records and accounts, and in the customary manner, 14/ with interest added thereto at the rate of 6 percent per annum. 15/

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend 16/ that Heck's Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Unlawfully interrogating employees concerning their union membership, activities or desires.

(b) Threatening their employees with reprisals if they select the Union as their representative.

(c) Offering or granting their employees wage increases and/or promotions in exchange for their active opposition to the Union.

(d) Discharging or otherwise discriminating against employees in respect to hire and tenure of employment for the purpose of discouraging union membership or engaging in concerted activities.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer immediate and full reinstatement to James Goins to his former or substantially equivalent position and make him whole in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

(b) Post at its Nitro, St. Albans and Charleston, West Virginia stores and warehouses copies of the notice attached hereto as "Appendix." Copies of said notice to be furnished by the Regional Director for the Ninth Region shall after being duly signed by the Respondent, be posted immediately upon receipt thereof, in conspicuous places, including places where notices to employees are customarily posted, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

14/ F. W. Woolworth Co., 90 NLRB 289.

15/ Isis Plumbing & Heating Co., 138 NLRB 716.

16/ In the event that this Recommended Order be adopted by the Board, the word "RECOMMENDED" shall be deleted from its caption and wherever else it thereafter appears; and for the words "I RECOMMEND" there shall be substituted "THE NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

(c) Notify said Regional Director in writing within 20 days from the receipt of this Decision what steps the Respondent has taken to comply therewith. 17/

(d) Notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

It is FURTHER RECOMMENDED that so much of the complaint in this proceeding as alleges unlawful discrimination against Ivan Vickers and Respondent's unlawful refusal to bargain with the Union be dismissed.

Dated at Washington, D.C.

Thomas F. Maher
Trial Examiner

17/ In the event this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant our employees wage increases and/or promotions in exchange for this opposition to the aforesaid union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

HECK'S INC.

and

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Cases Nos. 9-CA-3356, 3477

William C. Mittendorf, Esq., of Cincinnati, Ohio, for the General Counsel.
Gardner, Gandal & Holroyd, by Fredrick F. Holroyd, Esq., of Charleston, W. Va., and George V. Gardner, Esq., of Washington, D. C. for the Respondent.
Pottenbarger & Bowles, by Martin C. Bowles, Esq., of Charleston, W. Va., for the Charging Union.

Before: Thomas F. Maher, Trial Examiner.

TRIAL EXAMINER'S SUPPLEMENTAL DECISION

Statement of the Case

On November 30, 1965, a Decision was issued by me in this proceeding finding and concluding that Respondent herein, Heck's Inc., had not unlawfully refused to bargain collectively with Chauffeurs, Teamsters and Helpers, Local Union No. 175, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the Union Company, and I accordingly dismissed the Section 8(a)(5) allegation, for the reason that the General Counsel had failed to meet the burden of establishing what precisely was the appropriate unit in which the Union had its majority. In addition, I made certain findings of violations of Section 8(a)(1) and (3) of the Act and recommended that specified remedial action be taken with respect thereto. The case was transferred to the National Labor Relations Board, herein called the Board, on the same day. Thereafter counsel for the General Counsel and Respondent filed exceptions to my Decision and counsel for the General Counsel filed a brief in support of his exceptions.

In due course the Board, upon review of my Decision, the exceptions, supporting briefs and the record, on March 23, 1966, issued its Order Reopening Record and Remanding Proceeding to Regional Director for Further Hearing.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

HECK'S, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2023 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3627).

The Board found "on the basis of the entire record that the General Counsel was plainly contending that the appropriate unit consisted of all truck-drivers and warehouse employees at the Nitro, St. Albans and Charleston warehouses" of the Respondent. It ordered that the hearing be reopened for the purpose of adducing additional evidence concerning the nature and appropriateness of the bargaining unit, the majority status of the Union, and the alleged refusal of the Respondent to bargain with it, and directed that I prepare and serve upon the parties a Supplemental Decision containing findings of fact, conclusions of law and recommendations to the Board based upon the evidence contained in the entire record.

Pursuant to notice issued on September 28, 1966, by the Regional Director a further hearing was held before me in Charleston, West Virginia. All parties appeared and were afforded full opportunity to be heard, to adduce relevant evidence, to examine and cross-examine witnesses, to present oral argument and to file briefs. Briefs were filed with me on December 15, 1966, by counsel for Respondent and the General Counsel.

Upon the entire record, including the evidence adduced at both the original and subsequent hearings, and all briefs submitted by the parties, I make the following:

Findings of Fact and Conclusions of Law

A. The Scope of the Remand

In its Order of Remand the Board specifically found "on the basis of the entire record that the General Counsel was plainly contending that the appropriate unit consisted of all truckdrivers and warehouse employees of the Nitro, St. Albans and Charleston warehouses," these being the three stores and warehouse locations established in the Charleston area, and discussed and identified in further detail in my original Decision. 1/

Because the Board deemed the record before it inadequate "to determine the unit and majority questions" I have been directed to adduce evidence as to (1) whether the unit sought by the Union was in fact "appropriate" for the purposes of collective bargaining, (2) whether the Union represented a majority of employees in said unit, (3) whether the Respondent's refusal in said unit was lawful.

B. The Unit Claimed by General Counsel

As determined by the Board in its Order of Remand the General Counsel contends that the unit appropriate for collective bargaining herein consisted of

> All truckdrivers and warehouse employees at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees. 2/

1/ Reference to my original Decision at a designated page will be indicated herein as TXD, p. _____.

2/ The excluded categories were not set forth in the General Counsel's original contention but appeared for the first time in his most recent brief to me. At the further hearing counsel for the General Counsel indicated on the record as intent to set forth an alternate unit position. As the Board has specifically ruled on the nature of the unit being contended for I precluded counsel from further discussion of alternatives.

C. The Appropriate Unit

In response to the Board's inquiry in its Order of Remand as to the appropriateness of the bargaining unit sought by the Union there is a basic difficulty. It has not been established by the record that when the Union made its demands it did so in a given unit. Thus, as previously found, Union Representative Jackson credibly testified at one point

> Mr. Haddad said that he had the warehouses in all his stores and as a result questions the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in these stores. (Tr. 35)

Precinding from this for purposes of determining the appropriateness of the unit which the General Counsel contends for, that unit may be identified as comprising the employees at the several warehouses of the Respondent's retail chain stores located in the Charleston, West Virginia, geographical area.

As to the retail stores themselves it is settled that all of such located in a geographical area may constitute a single bargaining unit. 3/ It is equally well settled that a unit of employees in the retail industry engaged in warehouse functions, including the truckdrivers, constitutes an appropriate bargaining unit. 4/ A fortiori, two or more groups of employees constituting all of the employer's warehouse employees in the geographical area would likewise constitute an appropriate unit.

The record in the instant proceeding discloses that in the respective warehouses there is a complete separation of functions of the warehouse employees and the selling personnel, and no interchange between either group. Thus the respective warehouse areas are completely partitioned off from the selling areas, inter-access being by door; the individuals employed in the warehouse are separately supervised there; they perform the usual warehousing functions such as a truck unloading, unpacking, pricing, storing, and the delivery of items to the selling floor. There is, however, a dispute as to whether certain Pricers should be included in the unit, it being stipulated, nevertheless, that those at the Nitro store be included. The General Counsel would exclude the Clothing Pricers at the St. Albans and Charleston warehouses, Employees Taylor and Russe, while on the other hand the Company would include them. Everyone agrees the Pricers at Nitro should be included. Both Taylor and Russe, each of whom price clothing exclusively, work in warehouse areas, but in each case in a section partitioned off from the rest of the warehouse. In the course of their duties each of them receive pricing instructions from the supervisor of the Clothing Department. Each employee is carried on Respondent's personnel records as a warehouse employee and there is no evidence that they are engaged in selling functions as part of their usual duties.

3/ Sav-On Drugs Inc., 138 NLRB 1032.
4/ The May Department Stores Company, 153 NLRB 341; Loveman, Joseph and Loeb, 152 NLRB 719.

From the credited testimony of Employees Larry Woodall and Dayle Thorton, called as witnesses by the General Counsel, and of Personnel Manager Ray Darnell, it is clear that except for the segregated work areas provided for Clothing Pricers at each warehouse the nature of their duties does not differ substantially from that of other pricers, and indeed the separation at St. Albans was explained by the existence of such a separate room in the warehouse when first the building was acquired. Certainly the inherent character of clothing merchandise should itself explain why warehousing it separately from the general stock would be prudent practice, avoiding soilage and spoilage. And finally it is evident that the instructions which the Clothing Pricers receive from the Clothing Department supervisors would constitute a reasonable source of pricing information. Nor is there anything in the record to suggest why the Clothing Pricers at two warehouses should be treated differently from those at the third warehouse, Nitro.

Upon review of all of the foregoing considerations it is apparent that the elements of community of interest and integration of the Clothing Pricers at St. Albans and Charleston with the other warehouse employees are not lessen by any routine contacts these employees may have with personnel in other areas of the store anymore then would the truckdrivers' like community of interest be destroyed by their regular absence from the warehouse, driving about the city. On the contrary, the Pricers in question, both female employees, have warehouse supervision, do the same general type of work, excepting the heavy lifting, wear clothing appropriate to their duties, and associate occupationally with the warehouse employees, meeting with others only on an "emergency" or sporadic basis. I would therefore conclude and find that <u>all</u> Pricers are appropriately a part of the warehouse unit.

Upon all of the foregoing I would conclude and find as a unit appropriate for the purposes of collective bargaining

> All truckdrivers and warehouse employees, including all pricers at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

D. <u>Majority Status of the Union in the Above-Described Unit Found to be Appropriate</u>

As previously found by me (TXD, pp. 2-3), by October 9, 1964, thirteen employees in the three warehouses had signed cards authorizing the Union to represent them and submitted them to Union Representative Jackson. These cards presented to President Haddad as evidence of the Union's claim and inspected by him were for the following

Charles D. Curry	James A. May
Charles G. Ferrell	Opie G. Nelson
James E. Goins	Samuel D. Nelson
Edward L. Hughart	Virgil R. Searls
Richard Johnson	Doyle Thornton
Franklin T. Lanham	Ivan L. Vickers
	Larry Woodall 5/

5/ Everett Nichols, Warehouse Clerk, and Anna L. Adkins, Cosmetic Pricer, signed the cards on October 10 and 13 respectively. Obviously these were not included among the cards submitted to Haddad.

All cards received in evidence were identified by the respective employees or by Jackson in whose presence they were signed. There is no contest as to either their authenticity or to the fact that each was signed for the purpose of selecting the Union as bargaining representative.

As I have previously found and concluded that Ivan Vickers was a supervisor at all relevant times herein (TXD, p. 7) his card cannot be included among those cards availed of by the Union to support its claim of majority status on October 9. I accordingly conclude and find that upon that date, on the occasion of Union Representative Jackson's request of President Haddad that Respondent bargain with the Union (TXD, p. 3), the Union represented 12 employees, as evidenced by cards in its possession.

As a means of establishing the composition of the bargaining unit claimed by General Counsel to be appropriate a list of warehouse employees at Nitro, St. Albans and Charleston, supplied by Respondent, was admitted into evidence. The list is as follows, excluding four individuals, Graley, Vickers, Elbert Ferrell, and Overton, who have either been found by me or stipulated to be supervisors:

Nitro, West Virginia	
Anna Lou Adkins	Pricer
James A. Cooper	Warehouseman
Charles D. Curry	Warehouseman
Charles F. Ferrell	Warehouseman
Sheila V. Hostein	Pricer
Richard Johnson	Driver
Earl Keeney	Driver
Franklin T. Lanham	Pricer
Charles E. Lewis	Pricer
James A. May	Warehouseman
Opie Nelson	Warehouseman
Dallas T. Queen	Warehouseman
Virgil Searls	Warehouseman
Lloyd J. Slack	Driver
Roger Stackey	Warehouseman
St. Albans, West Virginia	
Wayne Baker	Warehouseman
Samuel D. Nelson	Warehouseman
Everett Nichols	Warehouseman
Evelyn Taylor	Pricer
Larry Woodall	Driver
Charleston, West Virginia	
Charles G. Ferrell	Warehouseman
Edward L. Hughart	Driver
Ernestine Russe	Pricer
Doyle Thornton	Warehouseman

A tabulation of this list indicates that there are a total of 24 eligible employees in the bargaining unit claimed by General Counsel and found by me to be appropriate.

Of the foregoing it is apparent that on October 9, 1964, when Union Representative Jackson presented the cards for Supervisor Vickers and the 12 warehouse employees to President Haddad and requested recognition and bargaining the Union represented only 12 of the 24 eligible rank-and-file employees in the unit which I find herein to be appropriate. It did not <u>at that time</u> represent a majority.

E. Subsequent Activity Relating to the Bargaining Unit

Two more cards came into the possession of the Union after it had shown the original group of cards to Haddad; the cards of Nichols and Adkins, signed on October 10 and 13, respectively. Meanwhile a number of events had transpired. Harry Turner, Department Head of Housewares at Charleston, engaged in conversations on the following day, October 10, which I have already found to contain unlawful threats to cancel wage increases and discontinue bonuses if the Union got in. (TXD, pp. 4-5). A week later President Haddad offered a promotion to one of the employees who had joined the Union on condition that the employee would agree to work against the Union (TXD, p. 5). And again a week later he offered a similar inducement to Supervisor Vickers for the same purpose (TXD, pp. 5, 7). These incidents I have already found to constitute unlawful interference, restraint and coercion. Additionally I found that on October 10 Respondent discriminatorily discharged Employee James Goins (TXD, pp. 5-7).

Meanwhile, on October 12, the Union filed its petition in Case No. 9-RC-6097, later withdrawn, seeking an election among

> all employees of the Employer employed at its places of business as warehousemen and truckdrivers; excluding all office clerical employees, all guards, professional employees and supervisors, and any others excluded in the Act, as amended.

The petition indicates the Union's belief that there were 19 employees in the bargaining unit, and it makes no reference to Pricers, all of whom I have found (over General Counsel's objection as to those in St. Albans and Charleston) to be included in the appropriate unit (supra, p. 4).

While it is evident that the Union did not have a majority of the 24 employees when it requested recognition on October 9 it did achieve this majority on October 10, with Nichols' card, and it increased it by one more with Adkins' card on October 12. If, then, on October 10, and thereafter, the Union continued to claim recognition the issue of Respondent's refusal becomes a real one indeed.

During the week after his initial request for recognition, "about the 12th or 13th of October," Jackson, as I have already found (TXD, p. 4), in the course of seeking the reinstatement of the discharged Employee Goins (TXD, p. 5), asked President Haddad a second time to recognize and bargain with the Union, and again received the same reply: "No comment."

I would conclude and find that Jackson's request for recognition first made on October 9, 1964, became a continuing request thereafter for the reason that (1) it was followed by the filing of a representation petition the next day, 6/ (2) it was followed immediately by an effort on the part of Supervisor Turner to procure defections from the Union, and finally (3) on October 12, a new request was made of Haddad by Jackson and refused, to be followed thereafter by Haddad's efforts to induce union members to defect from the Union.

6/ See Ivy Hill Lithograph Co., 121 NLRB 831, 835, fn. 13; Automotive Supply Co., Inc., 119 NLRB 1074.

In summary, therefore, it is apparent that during the pendency of its claimed majority status prior to October 12, the Union possessed the cards of 13 of the total complement of 24; and that after October 13, upon receipt of Adkins' card and after Jackson's second request for bargaining, and at a point when a further request would be deemed futile, 7/ I would conclude and find that in support of its continuing demand for recognition the Union then had 14 valid designation cards, of a possible total of 24, in its possession. Thus there is conclusive evidence that during the period in question the Union had established and maintained its majority status in a unit which I find to be appropriate for the purposes of collective bargaining.

F. The Legality of Respondent's Request to Bargain

Jackson's demand of Haddad for recognition has, at first glance, the appearance of a flexible one. Thus after testifying at several points that he requested recognition and bargaining for truckdrivers and warehousemen at the three local facilities he then testified in response to questioning of counsel for the Union, as follows:

> Mr. Haddad said that he had warehouses in all of his stores and as a result questioned the unit. However, I told him that I was amenable to negotiate either on behalf of the Nitro Warehouse or separate contracts for the warehouses in the stores (Tr. 35).

It is true, of course, that an employer cannot be held to have refused to bargain collectively with the representative of an appropriate unit until the representative has first sought or indicated a desire to bargain for the unit. 8/ Thus any variance between the unit requested and that found appropriate raises an issue in this respect. It has long been held by the Board, however, that to be fatal any variance must be a substantial one. 9/ Such is not the case here. Indeed there is no variance, but rather an alternative, if even that could be spelled out. Jackson made his demand for truckdrivers and warehousemen, the latter being deemed by me to include Pricers. In an effort to accommodate he then suggested the alternative of separate contracts. But he certainly cannot be said to have abandoned his original claim. Therefore, I do not view this offer of accommodation to be the substantial variation intended by the Board and I see no other variance. Accordingly, I would conclude and find that a valid demand in the appropriate unit was made on October 9, and for reasons already stated continued thereafter.

It is apparent from Respondent's intervening and subsequent conduct which I have already found to be violative of the Act (TXD, supra) that it was engaging in a course of conduct calculated to undermine the Union and reflected a rejection of the principles of collective bargaining. I am persuaded therefore, that its refusal to bargain with the Union as a majority representative of the employees in the unit which I have found to be appropriate was not grounded upon any element of good faith but constituted a refusal to bargain in violation of Section 8(a)(5) of the Act, thereby interfering with, restraining and coercing its employees in violation of Section 8(a)(1). 10/

7/ America Compressed Steel Corporation, 146 NLRB 1463, enfd. 343 F. 2d 307 (C.A., D.C.).
8/ N.L.R.B. v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300.
9/ Barlow-Maney Laboratories, 65 NLRB 928.
10/ The Great Atlantic and Pacific Tea Company, Inc., 162 NLRB No. 110.

C. The Remedy

I have already found that the Respondent has engaged in certain unfair labor practices which I recommend be remedied by the issuance of an order that Respondent cease and desist from the conduct found and that it further cease and desist from infringing in any other manner upon the statutory rights of its employees and an affirmative order reinstating Employee James Goins with backpay (TXD, p. 10-12). I shall reaffirm these recommendations by appropriate reference in my Supplemental Recommendations herein. In addition, I shall recommend that Respondent bargain collectively with the Union in the unit which I have found to be appropriate for bargaining purposes, and I shall further recommend that it be required to post a notice of compliance which consolidates the matters contained in both my original and supplemental recommendations.

SUPPLEMENTAL RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, and the National Labor Relations Board's Order of Remand issued to me in this proceeding, I hereby reaffirm my recommendations contained in my Decision issued on November 30, 1965, and I further recommend 11/ that Heck's Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from refusing to bargain with CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA as the exclusive representative of employees in the following unit found to be appropriate for the purposes of collective bargaining:

All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request bargain collectively with the above-named labor organization as the exclusive representative of all Respondent's employees in the unit found to be appropriate and , if an agreement is reached, embody such an understanding in a signed agreement.

(b) Post at its Nitro, St. Albans and Charleston, West Virginia, stores and warehouses copies of the notice attached hereto as "Appendix," it being a consolidation with the notice previously recommended be posted in this proceeding. 12/ Copies of said attached notice to be forwarded by the Regional Director for Region Nine shall, after being duly signed by the

11/ In the event that this Supplemental Recommended Order be adopted by the Board, the words "RECOMMENDED" shall be deleted from its caption and wherever else it appears thereafter; and for the words "I RECOMMEND" or "I FURTHER RECOMMEND" there shall be substituted "NATIONAL LABOR RELATIONS BOARD HEREBY ORDERS."

12/ In the event that this Supplemental Recommended Order be adopted by the Board the words "A DECISION AND ORDER" shall be substituted for the words "THE SUPPLEMENTAL RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

Respondent, be posted immediately upon receipt thereof, in conspicuous places, including places where notices to employees are customarily posted, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director in writing within 20 days from the receipt of this Supplemental Decision what steps the Respondent has taken to comply therewith. 13/

Dated at Washington, D. C.

Thomas P. Maher
Trial Examiner

13/ In the event that this Supplemental Recommended Order is adopted by the Board, this provision shall be modified to read "Notify the said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

FORM NLRB-4535A
(11-65)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE SUPPLEMENTAL RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT unlawfully interrogate our employees concerning their union membership, activities, or desires.

WE WILL NOT threaten our employees with reprisal for engaging in union activities or for supporting CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or any other labor organization.

WE WILL NOT offer or grant out employees wage increases and/or promotions in exchange for this opposition to the aforesaid union.

WE WILL NOT discharge, or otherwise discriminate against our employees in respect to hire or tenure because they are leaders in the aforesaid union or have participated in concerted activities protected by Section 7 of the National Labor Relations Act.

WE offer immediate and full reinstatement to his former or substantially equivalent position to James Goins, and WE WILL make him whole for any loss of pay he may have suffered, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy."

WE WILL notify James Goins, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

FORM NLRB-4333
(1-65)

T[illegible]-149-67

WE WILL upon request bargain collectively with CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 175, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive representative of all the employees in the bargaining unit described below concerning rates of pay, wages, hours of employment, and other conditions of employment, and , if an understanding is reached, embody it in a signed agreement. The bargaining unit is

All truckdrivers and warehouse employees, including all pricers, at the Nitro, St. Albans and Charleston warehouses, excluding office clericals, guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

All of our employees are free to become or refrain from becoming members of the above-named union, or any other labor organization.

HECK'S INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be [illegible]ered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, [illegible]y may communicate directly with the Board's Regional Office, Room 2407 Federal Office [illegible]lding, 550 Main St. Cincinnati, Ohio 45202 (Tel. No. 684-3686).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HECK'S INC.

and

Cases Nos. 9-CA-3828
9-CA-4147

FOOD STORE EMPLOYEES UNION, LOCAL #347,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL-CIO

DECISION AND ORDER

On September 29, 1967, Trial Examiner Sidney J. Barban issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case, and hereby adopts the findings,[1/] conclusions, and recommendations,[2/] as modified herein, of the Trial Examiner.

1/ In the absence of exceptions, we adopt pro forma the Trial Examiner's dismissal of those allegations of the complaint wherein he found no violations of the Act.

2/ We find that paragraph (f) of Section 1 of the Trial Examiner's Recommended Order is not in conformity with such Board Orders as are applicable to solicitation and distribution rules in retail establishments and it is therefore amended. Marshall Field & Co., 98 NLRB 88. We correct footnote 11, p. 18 of the Trial Examiner's Decision by deleting the word "evidence" and substituting therefor the words "the record."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Heck's Inc., St. Albans, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Paragraph (f) of Section 1 is amended by substituting therefor the following:

"(f) Promulgating, maintaining, or enforcing any rule prohibiting employees from engaging in union solicitation in nonpublic areas of its premises during their nonworking time, or from distributing union literature in nonpublic, nonworking areas of its premises during their nonworking time."

2. Add the following paragraph to Section 2 as paragraph 2(d) and renumber those paragraphs subsequent thereto:

"(d) Notify the above-named employees, if presently serving in the Armed Forces of the Unites States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces."

Amend the Notice attached to the Trial Examiner's Decision by substituting for the fourth and fifth paragraphs the following:

> WE WILL NOT prohibit you from soliciting for a Union in nonpublic areas of the Company store during your nonwork time.
>
> WE WILL NOT prohibit you from passing out or receiving union literature in nonwork areas of the Company store during your nonwork time.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act other than those found in the Trial Examiner's Decision.

Dated, Washington, D. C.

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

TXD--540--67
Charleston, W. Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

HECK'S, INC.

Respondent

and

Cases 9--CA--3828,
9--CA--4147

FOOD STORE EMPLOYEES UNION, LOCAL #347,
AMALGAMATED MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA, AFL--CIO

Charging Party

Sorrell Logothetis, Esq., Cassius B. Gravitt, Esq., and Thomas M. Sheeran, Esq., for the General Counsel.

Frederick F. Holroyd, Esq., of Charleston, W. Va., for the Respondent.

Albert J. Gore, Esq., and Joseph M. Jacobs, Esq., of Chicago, Ill., and Mr. Sherwood M. Spencer and Mr. Woodrow R. Gunnoe, of Charleston, W. Va., for the Charging Party.

Before Sidney J. Barban, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

These matters were heard before Trial Examiner Sidney J. Barban at Charleston, West Virginia, on March 21, 22, 23, and May 15 and 16, 1967, the adjournment of the hearing being granted at the request of the Charging Party to secure enforcement of subpenas served on Pearl White and Jerald Doss.

The consolidated complaints in this proceeding, issued on November 30, 1966, and January 31, 1967 (based upon charges filed on February 1, 15, 1966, and January 9, 1967), allege that the Respondent violated Section 8(a)(1) of the Act by various instances of interrogation of employees, surveillance, creating the impression of surveillance of employee union activities, threats, promulgation and enforcement of a no-solicitation

rule, and by requesting employees to report on union activities of others, that the Respondent violated Section 8(a)(3) of the Act by the discriminatory transfers of employees Jerald Doss and Ruby Davis, and by the discharges of employees Pearl White, Charles W. Burlingame and Camillia F. Perkins, and that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Charging Party on demand. The Respondent's answers to the complaints deny the commission of any unfair labor practices.

After the close of the hearing, the Respondent filed a motion to reopen the record for additional evidence with respect to the appropriate unit for collective bargaining, which was opposed by the General Counsel. For reasons considered hereinafter, the motion was denied.

Upon the entire record in this case,1/ from observation of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, the Trial Examiner makes the following:

Findings and Conclusions

I. The Business of the Respondent

Respondent, a West Virginia corporation engaged in retail sales of merchandise at various locations in West Virginia and Kentucky, during a recent representative annual period, had a gross volume of retail sales in excess of $500,000, during which period it received, at its operations in West Virginia, goods and materials in interstate commerce of a value in excess of $50,000. Only Respondent's operations at St. Albans, West Virginia, herein called the St. Albans store, are involved in this proceeding. Respondent is an employer engaged in commerce within the meaning of the Act.

II. The Labor Organization Involved

The Charging Party, herein called the Union, is a labor organization within the meaning of the Act.

III. The Alleged Unfair Labor Practices

A. Background

Since 1964, the Respondent has been the subject of eight previous unfair labor practice proceedings before the Board. In six of these the Respondent has been found by the Board to have engaged in unfair labor practices similar in a number of instances to those alleged in this matter, and involving some management officials involved in this proceeding. One prior case, alleging refusal to bargain in violation of the Act, was dismissed by the Board. A Trial Examiner's Decision has issued in the eighth matter but has not been passed on by the Board. None of these prior cases involved Respondent's St. Albans store. The decisions of the Board are reported

1/ The transcript is hereby corrected at page 135, line 22, to show that General Counsel's Exhibit 2-12 was received in evidence. The physical exhibit was correctly marked by the reporter as received.

at 150 NLRB 1565, 156 NLRB 700, 158 NLRB 121, 159 NLRB No. 104, 159 NLRB No. 127, 160 NLRB No. 32, and 160 NLRB No. 38. Notice has been taken of the Trial Examiner's Decision, in Case 9--CA--4185, only to the extent specifically stated herein.

B. Alleged Violations of Section 8(a)(1)

1. The rules against solicitation and distribution of literature

The Union began its organizational activities at Respondent's St. Albans store about the middle of October, 1965. Union Representative Woodrow Gunnoe visited the store a number of times, and about November 2, 1965, he distributed union literature to the employees in the store. Gunnoe stated that because of experience at other stores of Respondent, he particularly looked for evidence of signs prohibiting solicitation of employees and saw none. He testified that when he and some other union representatives returned to distribute literature to employees in the store about November 8, 1965, he saw signs prohibiting solicitation posted at the entrance to the store and near an office on the selling floor of the store.

There is a dispute as to whether these signs were posted for a considerable period before November 8, as Respondent's witnesses assert, or were not posted before that date, as Gunnoe and other witnesses for the General Counsel state. For reasons discussed hereinafter, the Trial Examiner finds it unnecessary to resolve this dispute. In addition, as will be shown, it is not necessary to resolve the slight confusion in the record as to the exact wording of the signs posted on the entrance to the store and at the selling floor office.

There was also a notice posted on the bulletin board in the employees' upstairs lounge reading: "NO SOLICITING OR DISTRIBUTING LITERATURE TO OR BY EMPLOYEES WHILE WORKING." There is again some dispute as to when this notice was posted, but it was clearly posted by the middle of November, 1965, when Respondent's vice president in charge of personnel matters, Ray Darnell, addressed the employees. Also, at that same time, the current "Heck's Employees Policy Handbook" distributed by Respondent to employees contained the following rule with respect to "Solicitation": "No solicitation, either by employees or others, will be permitted on the premises, without the express written permission of the store manager. Upon observing any such solictating [sic], please report the same to the store manager." Store Manager Quinlan testified that this handbook had been in existence over 2 years.

On November 8, 1965, when Gunnoe and other nonemployee representatives appeared in the store with Union literature, one of the employees notified Assistant Store Manager Peters and he came to the front of the store where he advised Gunnoe that there was a rule against distributing literature in the store. It is clear that when Gunnoe continued around the store with the literature in his hand, Peters followed him. Gunnoe contends that Peters took some of the literature away from employees to whom he had distributed it. Peters states that the employees gave the literature to him, and that he did not take it from them involuntarily. Since none of General Counsel's witnesses were able to testify as to what may have been said between Peters and the employees involved, and since their

descriptions of Peters' actions are not inconsistent with the employees' having given him the papers voluntarily, Peters' testimony on this point is credited. After 10 to 15 minutes in the store, Gunnoe and the other Union representatives left.

In mid-November, 1965, Respondent's vice president and personnel manager, Darnell, had meetings with employees on the morning and afternoon shifts. It is found, on the basis of all the evidence, that in these meetings, Darnell told the employees that they would be fired if they engaged in any activities on behalf of the Union while they were on the premises of the Respondent. The testimony of both Assistant Store Manager Peters and Store Manager Quinlan clearly indicates that the rule against union activity applied to the employee lounges, even while the employees were on breaktime. Thus, Peters, when asked if the no-solicitation rule applied in the employees' lounge, answered that he thought so.2/ Quinlan stated that the rule prohibiting solicitation or distribution of literature "while working" would prevent the employees from those activities "at any time." Even Darnell's testimony makes it plain that he equated "working time" with all time spent at Respondent's store, as distinguished from employee activity after they left the store. Thus, when asked if he made any reference to "no soliciting being permitted on Company property," he answered, "I said during working hours, I informed the people that as long as they wanted a Union, that it was strictly up to them, as long as anything was conducted outside the scope of their working hours. What they did <u>after they went home</u> was strictly up to them, . . . but during working hours, they still had a job to do and as long as I had anything to do with the Company, that they would do their job when they were on the job" (emphasis supplied).3/ The fact that the rule prohibiting union activities applied to the employee lounges is also made evident by the statement of the rule in the employees' manual.

This rule, prohibiting union activities by employees on nonworktime and in nonwork areas, clearly interferes with, restrains, and coerces employees in the exercise of rights under the Act and violates Section 8(a)(1) of the Act. The affirmation of the rule by Darnell, shortly after the inception of the organizing campaign at St. Albans, enforced by threats of discharge for breach of the prohibition, was designed to prevent legitimate union activities of the employees, and similarly violated the Act. It is not necessary to resolve the conflict with respect to the time

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2/ Later, after a leading question by Respondent's counsel with respect to whether any employee had ever been restricted from soliciting while he was not working, Peters agreed that to his knowledge that had not occurred and then flatly stated that the no-solicitation rule did not apply in the lounges. However, Peters stated that passing out handbills in the lounge would not be permitted.

3/ Darnell also said that the "no solicitation rule" applied during "<u>store</u> working hours" (emphasis supplied). Darnell's denial that the employees were threatened with discharge if they talked about the Union on Respondent's property is not credited to the extent inconsistent with the findings made herein.

of the posting of the rule in the employee lounges since, even if it were posted coincident with the beginning of the union drive, to thwart the attempt at organization, as the General Counsel urges, no additional or different remedy would be required.

The posting of the signs at the door to the store, whether expressed in the same terms as the sign posted in the lounges or whether merely stating that no solicitation was allowed in the store, did not intrinsically constitute a violation of the Act. See Salant and Salant, Inc., 164 NLRB No. 143. Nor, in the absence of any showing that others were permitted to solicit among the employees on the selling floor, would it appear to be a violation, even if the notices were posted at the doors to the store after the first distribution of literature to the employees in the store and before the second attempt at such distribution, as the General Counsel contends. Cf. Priced-Less Discount Foods, Inc., d/b/a Payless, 162 NLRB No. 75. The Board has long held that employees at work on the selling floor of retail stores may be prohibited from union activities, on a nondiscriminatory basis, because of the special problems of the retail industry. Certainly, the right to regulate the solicitation of employees on the selling floor by nonemployees is no less. The Trial Examiner does not find, therefore, that Respondent violated the Act by posting no-solicitation signs at its front doors and at an office on the selling floor.

While the General Counsel argues in his brief that the action of Assistant Manager Peters in following Gunnoe through the store, and observing his actions and those of the employees, violated the Act, it is noted that this was not alleged in the complaint as a violation. Moreover, assuming, as I do, that Respondent had the right to prohibit distribution of literature to employees on the selling floor and to prohibit employee union activities under those circumstances, it would necessarily follow that Respondent could take reasonable steps to enforce those rules. Peters' actions, on this record, do appear to be reasonably adapted to the enforcement of the rules as they related to activities on the selling floor. See Randall's, 157 NLRB 86, 90--91. This is particularly so since it is found that the record does not establish that Peters, as alleged by the complaint, on this occasion, confiscated Union literature from the employees in order to improperly interfere with, restrain, or coerce the employees in the exercise of their rights under the Act. It is recommended that this latter allegation of the complaint be dismissed.

2. Other alleged violations of Section 8(a)(1)

(a) It is alleged that in his talks to the employees in mid-November, 1965, Personnel Manager Darnell threatened to withhold pay raises if the employees selected the Union as their bargaining representative. No proof was offered with respect to this and it is recommended that this allegation be dismissed.

General Counsel did adduce proof to the effect that Darnell told the employees that even if they selected the Union as their representative, and the Respondent were compelled to bargain with it, the employees would receive no pay raises because the Respondent was already doing the best it could for the employees. This was not specifically denied by Darnell, who stated that he said that if the Union came in, any pay raises would

be those negotiated with the Union. Assuming that this evidence might show a threat by Darnell that Respondent would make any selection of a bargaining representative by the employees an act of futility, this was not alleged in the complaint or argued by the General Counsel at the hearing or in his brief, and the Trial Examiner is not satisfied that this question was put in issue so that the Respondent might meet it. No finding is therefore made on this issue.

(b) Ruth Baker testified that her department head, Edith Dent, concededly a supervisor within the meaning of the Act, early in November, 1965, "asked me if I knew that the union was trying to get in. And I said, well, do you think they will. And she said I'm afraid so. She said you'd be surprised that the ones that have been here the longest that have signed already."

It is alleged that Dent, by indicating that she knew who had signed Union cards, improperly created the impression of surveillance of employee union activity. To the contrary, the impression is that this was a casual conversation between a minor supervisor and an employee accustomed to such conversations, with no overtones of interference with employee union activity at all. There is no evidence of any other antiunion activity on the part of Dent. It is recommended that this allegation of the complaint be dismissed.

(c) Jerald Doss testified that about November 20, 1965, he had three telephone conversations with Respondent's president, Fred Haddad, on the same day. In the first, Doss states, "He called me and asked me if there was any Union talk in the store and I told him no. He asked me where I eat, if I eat in the employees' lounge, and I told him no, and he wanted to know if there had been any Union talk in the employees' lounge and I told him no, because I hadn't been eating in there."

During the second conversation, Doss stated that Haddad "asked if Charles Young and I had been having Union meetings at my house, and I said no.4/ He asked if Carolyn Edens did, I believe, the only name I remember." Doss testified that Haddad named other employees, whose names Doss no longer remembered, and asked if they had attended meetings at his home or any other place. Haddad further told Doss, after the latter's denial that there had been Union meetings, that Haddad knew that there were such meetings. Haddad told Doss that his house had been watched.

In a third conversation that day, Haddad again asked Doss about his involvement in Union activity, which Doss denied, and then asked Doss if he "would listen for Union talk and report back to him," which Doss said he refused to do. Very shortly thereafter, as discussed hereinafter, Doss was transferred to another store.

None of this is denied by Haddad and Respondent, in its brief, states that it admits these matters, as alleged in the complaint.

4/ Young and Doss shared an apartment. Judging by the Union authorizations in evidence witnessed by Young, he was rather active on behalf of the Union.

Doss also testified, without contradiction, that he overheard Personnel Manager Darnell ask Pearl White, who Respondent claims is a supervisor, if Doss was engaged in Union activity. This is supported by White who testified that Darnell also asked her if she knew anybody who had joined the Union.

(d) Pearl White testified that prior to her discharge on February 1, 1966, and apparently on the same day, President Haddad approached her at work in the store and asked her if she had joined the Union, which she avoided answering. However, when Haddad persisted, White denied that she had joined. Haddad then stated that he had a paper in his hand that proved that she had. Haddad stated that he had been at a meeting with the Union that day and he knew who had signed and who hadn't. White described Haddad as "angry," and stated that Haddad said "he would transfer or fire or whatever you want, out the door. . . ." Haddad also said to White, "You are the stupidest bunch to sign up for the Union."

As with Doss, this was not denied by Haddad, and Respondent, in its brief, admits the allegations of the complaint with respect to the facts of this conversation.

(e) Employee Charles W. Burlingame testified that on December 21, 1966, Personnel Manager Darnell engaged him in conversation in the St. Albans store, during the course of which Darnell asked him if he "had heard whether or not there was being a union organized or if I knew of any individuals trying to bring the union into the store." Burlingame stated that he had no direct knowledge of this, after which Darnell asked him to find out for Darnell who was trying to bring the Union in and to report to the store manager or to Darnell, but not to mention this conversation to anyone else. Burlingame also stated that Darnell asserted he had ways and means of finding out these matters. Burlingame never thereafter reported to Darnell on this subject.

Although specifically questioned as to a conversation with Burlingame with respect to the Union, Darnell never specifically denied, or referred to the above. Darnell did recall a conversation with Burlingame, which he placed in early December, in which he asked Burlingame to find out for him why the hardware department, in which Burlingame worked, was in such a messy condition. Darnell indicated that he made this request of Burlingame because he had personally hired Burlingame and had taken a personal interest in him.

Since there is no reason to question Burlingame's account of the conversation, and it is not denied, his testimony as set forth is credited.

On the basis of the evidence set forth in subparagraphs (c), (d), and (e) above, it is found that Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees, making threats of reprisal because of the Union activities of employees, creating the impression of surveillance of Union activities, by seeking to induce employees to engage in surveillance and report on employees' Union activities, and, by the admission of Haddad, actually engaging in such surveillance.

As hereinafter discussed, it is found that Pearl White was not at the time of her conversations with Haddad and Darnell, set forth above, a supervisor within the meaning of the Act. Moreover, even if she were a supervisor at those times, the activities set forth, in the context of this record, would, nevertheless, constitute violations of the Act. It is clear that the interrogation of White and the threats made to her were not related to any justifiable purpose of Respondent, but were, rather, a part of a pattern of conduct adopted by Respondent to deprive its employees of their rights guaranteed by the Act. Moreover, the record as a whole, and particularly the relationship which apparently existed between front-line supervision and employees in the St. Albans store, makes it reasonable to anticipate, as Respondent must have known, that the statements made would be transmitted to the employees.

C. Alleged Discriminatory Treatment of Jerald Doss and Ruby Davis

Doss was employed at the St. Albans store in February, 1964, where he worked only as a shoe clerk. In November, 1965, within 3 or 4 days after he had refused to assist Respondent's president, Haddad, by engaging in surveillance of employee Union activities and reporting back on those activities, and after Haddad told him that he knew that Union meetings were being held in Doss' dwelling, because it had been under observation, Doss was transferred to Respondent's store at Kanawha City. Although this store was only 13 miles distant, it is clear from Doss' entire testimony that this was an incovenience to him because he was compelled to drive to the Kanawha City store, while he lived within close walking distance of the St. Albans store.5/ The Respondent gave Doss an increase in pay as a result of the transfer. It appears that Quinlan, the St. Albans store manager, was not aware of the reason for the transfer at the time it was made, and was unable to tell Doss why he was being transferred. Doss subsequently found out that he was transferred to take the place of an employee who was off sick. When that employee returned, Doss was transferred to the sporting goods department at Kanawha City. When a vacancy occurred in the shoe section of the St. Albans store because of the discharge of Pearl White, who Respondent claims to have been a supervisor, Doss was transferred back to St. Albans for a short time to train a new employee for the shoe department. Quinlan, at the time, told Doss that Quinlan was happy to have him back. Doss, however, was shortly thereafter again transferred to Kanawha City. On February 10, 1966, he was laid off, allegedly for lack of work. It was testified that at the time, Doss had the least seniority in the sporting goods department at Kanawha City, but was not the junior in service in the store.

Doss was one of a number of persons who were alleged to have been discriminated against in a charge filed by the Union with the Regional Office of the Board on February 15, 1966. After Respondent called him back to work on February 25, 1966, he worked 1 day, and then quit to take

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5/ As previously noted, it was necessary to recess the hearing to secure enforcement of subpenas directed to Doss and Pearl White. Both exhibited reluctance in their testimony for the Union and the General Counsel and some evidence of a tendency to shade their testimony in favor of the Respondent. However, their testimony consistent with prior statements made by them, as shown by their testimony, is credited.

a job with another employer. Since then the Respondent has reemployed him, apparently in a supervisory capacity, in a store a considerable distance from the Charleston area, in which both the St. Albans and Kanawha City stores are located.

The complaint alleges that the Respondent discriminated against Doss by transferring him between the St. Albans store and the Kanawha City store and constructively discharging him on or about February 28, 1966. Although there may be reason to believe that Doss was led to quit his employment with Respondent because of Respondent's actions, and Doss so stated to a Union representative at the time, the preponderance of the evidence does not support the contention that Doss was forced to quit Respondent's employment because of discriminatory actions of the Respondent, and it is recommended that this allegation of the complaint be dismissed.

However, the record is convincing that the various transfers of Doss were motivated by Respondent's desire to remove him from the St. Albans store because of his apparent involvement with the Union drive at the time and his refusal to cooperate with Respondent's antiunion activities. Thus, he was transferred almost immediately after he refused to spy and report on employee Union activities. The transfer is stated to have been for the purpose of filling in for an employee who was sick. However, according to Darnell, temporary situations of this sort are normally filled by the employment of part-time help. In addition, when this temporary need was alleviated by the return of the sick employee, Doss was not returned to St. Albans, but was transferred to a department at Kanawha City in which he apparently had not previously worked. When an opening occurred in the shoe section at St. Albans in which he was experienced, he was not transferred back permanently, but was recalled for a few days to train a new employee for the shoe section. This assignment, and Quinlan's stated pleasure in having Doss back, attest to Doss' value as an employee. However, within a few days, Doss was again returned to Kanawha City to work in the sporting goods department where there was apparently no particular need for him since he was shortly thereafter laid off for lack of work.

For the reasons stated, and upon the entire record, it is found that by the various transfers between the St. Albans store and the Kanawha City store referred to above, Respondent discriminated against Doss in violation of Sections 8(a)(3) and (1) of the Act. No finding is made with respect to the layoff of Doss on or about February 10, 1966, from the Kanawha City store, because this was not alleged as a violation of the Act or clearly litigated as a separate violation of the Act.

The General Counsel did not prove any discriminatory treatment of Ruby Davis and the allegations of the complaint to that effect are dismissed.

D. The Discharge of Pearl White

Pearl White was hired in 1961 or 1962 as a saleslady in the clothing department at the St. Albans store. Until her transfer to Respondent's Washington Street store, White apparently sold only shoes, which were part of the clothing department at St. Albans at that time. After her transfer to the Washington Street store, she was head of the clothing department at that store and was paid by salary, as is normal with Respondent's department heads.

In March, 1965, White was transferred back to the St. Albans store, at her own request, at the same salary which she had received at the Washington Street operation. Prior to her return to St. Albans, the shoe section in the store had been considerably enlarged, and White was assigned to that section. Although there is some variation in the testimony, it appears that during the period after her return and up to White's discharge there were normally three employees in the shoe section, including White. White would work alone on one shift, normally, and the other two employees would be on the other shift. White would rotate shifts, as would the other employees involved. Doss, who was one of the two employees who worked together in this section testified that occasionally he would work overtime, and thus would work together with White.

Respondent claims that during this period after she was transferred back to St. Albans until she was discharged on February 1, 1966, White was a department head, and thus a supervisor, over the shoe department. The General Counsel contends that not only was White not a department head during this period, but that, in fact, the shoe section was under the clothing department, and was not a separate department at all.

It is admitted that normally shoe sales are a part of the clothing department in all Respondent's stores, and it is clear that this was the case at St. Albans before White's transfer back, and appears to be the case at St. Albans since White has been discharged. Although department heads in Respondent's stores wear badges designating them as such, White did not, but wore the same sort of badge as other employees. In statements given before they were reemployed by the Respondent, both White and Doss referred to White as a sales clerk or saleslady, and did not refer to her as a department head, although in testimony in this proceeding both asserted that White was in charge of the shoe department. Moreover, those payroll records of employees in the shoe section at St. Albans during the period which were referred to (White, Doss, and Judy Raynes) all indicated that "shoes" continued to be a part of the clothing department.6/ Smith, the head of the clothing department, clearly had this impression at the time White was transferred back, because, according to White, Darnell, and Quinlan, Smith had to be told to leave White alone, after she complained to President Haddad that Smith was "trying to tell me what to do."

Although it has been held that Respondent's department heads are normally supervisors within the meaning of the Act, their supervisory authority may well be described as borderline in character. In the first proceeding before the Board in which their authority was considered, Hecks, Inc., 150 NLRB 1505, Respondent argued that they did not possess supervisory authority, but the Board, on the basis of the record there made, disagreed. Consistent with that decision, the Board, in a subsequent

6/ While this may be due to some degree to clerical inertia, as Darnell's testimony indicates, it also tends to emphasize the general understanding that the shoe operation was not a separate department.

case, Hecks, Inc., 156 NLRB 760, reversed a Trial Examiner's Decision holding that certain department heads were nonsupervisory.7/

In the present proceeding, the evidence as to the department heads' position shows that they are paid by salary while the employees generally are hourly paid. However, department heads, like other employees, punch a timeclock and regularly rotate shifts. Department heads also attend regular meetings with management for heads of Respondent's departments. Other than this, Quinlan testified that, "Department heads are in charge under me. . . . They have charge of the scheduling of the employees, they have charge of detailing their work, they report to us on the supervision of it and so forth. . . . They check with some of the buying, and she [sic] checks with us if they are late or tardy or if they are off sick or anything like that." This was the sum of the department heads' duties and responsibilities as detailed by Quinlan. Darnell was not asked and did not give other than conclusionary testimony on this subject.

Notwithstanding testimony by witnesses for Respondent, and by White and Doss, that White had the same duties and responsibilities as any other department head when she was transferred back to the St. Albans shoe operation, the record as a whole makes it plain that White's position was somewhat less than that of the normal department head. Thus, although Quinlan stated that White sometimes attended meetings of department heads, she asserted that she did not. Whereas Quinlan testified that White made schedules for her employees, like other department heads, White insisted that Quinlan made the schedules, and that she did not. While at one point White stated that she told the employees when to come in, at another she indicated that she consulted with Quinlan on this. Though she frequently, or normally, worked alone on her shift, White stated that she left word for the employees on the other shift as to what they were to do. To a certain extent she agreed these instructions concerned daily repetitive tasks which would be the lot of shoe clerks in any store. White had no authority to discipline clerks for errors. Like department heads, she did not hire or discharge employees or play any part in their transfer between departments. She did, like the department heads, have a certain responsibility for buying for the shoe operation at St. Albans.

Upon all of the evidence, and the above in particular, the Trial Examiner finds that White was not a supervisor within the meaning of the Act at the time of her discharge or the period immediately preceding. Her position was certainly less in weight and authority than that of the normal department head. Nor was she held out to the employees or to the

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7/ Although Respondent appears, in most cases since the original decision noted above, to have agreed that department heads are supervisory, there still appear to be variations possible from case to case. It is noted that although Carlton Boothby was apparently a supervisor at the time of the original case involving Respondent, 150 NLRB at 1565, in a later case, Boothby, although identified as "Assistant to the Assistant Store and/or Head of Clothing Department," was found to be nonsupervisory, and a part of the rank-and-file unit, when the record failed to affirmatively establish his supervisory authority. 159 NLRB No. 127, TXD at pp. 3--4, 5.

public as one of Respondent's department heads. While she occupied a position of more responsibility in the shoe operation than the ordinary employee, and may have exercised some judgment and discretion in the area of buying, she certainly does not appear to have possessed authority to exercise significant discretion or independent judgment in dealing with employees in the shoe section at the St. Albans store. The record as a whole shows that to the extent that her dealings with the other employees were other than routine, she regularly consulted with the store manager as to the problem involved. Further, it is noted that when President Haddad discussed White's Union activities with her, he expressed no concern that she as an asserted supervisor was doing wrong, but rather lumped her with the rest of the employees, who he said were the "stupidest bunch to sign up for the Union." While she continued on salary after her transfer, this factor does not itself supply the evidence of supervisory authority otherwise found to be wanting here. Compare footnote 6, above.

Therefore, since it is admitted that the Respondent discharged White because of her affiliation with the Union, it is found that by that action, Respondent violated Sections 8(a)(3) and (1) of the Act.8/

E. The Discharges of Camillia Perkins and Charles W. Burlingame

Perkins was first employed by Respondent at the St. Albans store in November, 1965. During the summer of 1966, she was off from work on at least two occasions. On an occasion when she was sick, she was immediately put back to work when she applied to Quinlan, which would indicate, according to Darnell's testimony, that she was a satisfactory employee. On another occasion, when Perkins asked Quinlan for a leave of absence so she could attend her daughter in the hospital, Quinlan told her that he could not give her a leave of absence, but that she should go on and not worry about her job. When she returned, Quinlan put her back to work.

Perkins signed a Union card in January, 1966. She testified that she was accustomed to participate in discussions about the Union in the restaurant next to the St. Albans store with other employees, but is not aware that this was observed by any supervisor. Apparently in December, 1966, she remonstrated with one employee who tore up his Union card in the restaurant.

Darnell testified that he made the decision to discharge Perkins on the basis of three "shoppers' reports" which were critical of Perkins, and because Respondent was cutting down on its sales help after the first of the year, in accordance with its normal practice. Perkins was terminated

8/ Indeed, even if White were found to be a supervisor at the time of her discharge, on the basis of this record and the reasons given by President Haddad for his displeasure at her activities in particular, it is plain that her discharge was motivated by a desire to discourage Union activities in general among the employees, rather than a concern that she, as an asserted supervisor, had signed a Union card, and her discharge thus violated Section 8(a)(1), in any event. See Hecks, Inc., 156 NLRB at 765.

on January 3, 1967, the same day as Charles W. Burlingame, by Store Manager Quinlan, who told her merely that her work was unsatisfactory. There seems to be no dispute that Perkins was never criticized or reprimanded for her work, nor was she informed that she had been referred to critically in shoppers' reports. She further testified, without contradiction, that in late December, prior to her discharge Store Manager Quinlan had spoken approvingly of work she had done.

Darnell, who testified that he did not personally talk to employees about these shoppers' reports, sent them on to the store manager, frequently with comments which would indicate that he expected the store manager to follow up the matter with the employee involved. However, Store Manager Quinlan testified that it was his policy, normally, not to tell the employee that he or she had been mentioned in such a report or to directly tell the employee that his or her work had been deficient. He explained his practice was to talk to the employee in general terms about the shortcoming involved, without indicating that the employee to whom he was talking was guilty of the deficiency. In some cases, however, he agreed that he would talk to the employee directly about matters contained in shoppers' reports. It would further appear that, after sending the store manager these reports with his comments, Darnell thereafter did not follow up to see if the store manager had done anything about the matter, in either the case of Perkins, or of Burlingame, who also was discharged on the basis of shoppers' reports.

It was explained by Darnell that, for approximately 2 years, the Respondent has used the services of an independent agency to shop its 10 stores and report on the employees observed. Each store is shopped once each month by anonymous persons, who pick at random the employees to be observed. It would appear that any individual employee would be infrequently reported on, and some employees, it was stated, have never appeared in the monthly written reports that are submitted to Respondent. Only five of these reports, from August through December, 1966, are in evidence. In these reports, only Perkins and Burlingame are mentioned more than once, and these two were the subject of derogatory comments in the reports for August, November, and December. It further appears that neither of them had been mentioned in any other report of this sort.

Darnell testified that a number of employees at various stores of Respondent had been discharged on the basis of shoppers' reports. He was not questioned as to the nature of the reports in those cases. Store Manager Quinlan stated that only one employee had been discharged at his store as the result of a shoppers' report, and that was for stealing.

Burlingame was hired by Darnell in May, 1966. It is conceded that he was for a time a very good employee, and was being considered as possible supervisory material. Indeed, Respondent made extraordinary efforts during this period to assist him when his wages were being garnisheed. However, both Darnell and Quinlan stated that they thereafter observed Burlingame not attending to his job, and assert that they discussed this between them. Again, it seems undisputed that nothing was said to Burlingame about such alleged deficiencies. Burlingame's uncontradicted testimony shows that even on the day he was discharged, Quinlan made a friendly

approving comment to him about the work in his department. Later that day, in discharging him, Quinlan stated that Burlingame's work had been unsatisfactory for the past month and a half. When Burlingame told his department head of this, the department head replied that Burlingame was one of the best workers that he had ever seen, and later told Burlingame that on the same day that Burlingame was discharged, the department head had told this to Respondent's president, Haddad.

Burlingame testified that about December 15, 1966, it had become generally known, apparently through the news media, that the Board was having what Burlingame referred to as a "meeting," and the Union thereupon became a subject of active discussion among the employees. Burlingame thereafter, himself, became active in seeking signatures to Union cards, and signed one himself on December 18, 1966. He also secured signed Union cards from his own department head, who expressed himself as believing that the store needed a Union, and from the department head of sporting goods at the St. Albans store.

Burlingame, like Perkins, was the subject of derogatory comments in shoppers' reports for August, November, and December, the latter report dated December 20, 1966. As previously noted, none of these were brought to Burlingame's attention, no further investigation of the criticisms in the reports were made, and Darnell's comments on the reports were apparently not followed up by either Darnell or Quinlan prior to the date of the discharges.

These discharges present difficult cases. On the basis of the background and the facts in this case, the Trial Examiner has no doubt that the Respondent would not hesitate to discharge employees for Union activities, in order to discourage such activities among its employees. Further, the evidence shows that the Respondent treats the shoppers' reports, which are the basis of the discharges of these two employees, with such casualness that it is difficult to accord them weight, and one wonders what were the contents of the reports which are asserted to have caused the discharge of employees at the other stores.9/

Moreover, these two employees, until the period just before their discharges, were rather well-regarded employees whom the Respondent might well have considered worth some effort to set straight, if they seemed to be going astray. Perkins was sufficiently well thought of that she was retained after the first of the year in 1965, although hired only the prior November, which indicates, according to Darnell's testimony, that she was one of the better employees, and she was reinstated after

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9/ In each of the three reports in which Perkins and Burlingame were involved, the criticism of each was directed to their attitude toward customers and alleged lack of helpfulness. In the December report there was criticism of Burlingame's language. Of course, since there was no direct testimony as to any of these alleged events, there is no proof that any of them actually occurred. The shoppers' reports were received as reports made to Respondent and not for the truth of their contents.

her absences during the summer of 1966, likewise a mark of Respondent's satisfaction with her. She had no prior bad marks against her record. Further, the record leaves no doubt that Burlingame was a superior employee, also with no criticisms against him until the end of his employment period. Indeed, prior to that time, Respondent had gone out of its way to assist him in his personal problems.

Nor was the testimony of Quinlan and Darnell denying knowledge of employee Union activity, including that of Perkins and Burlingame, impressive, particularly that of Darnell denying that he knew of the Union involvement of any employee except Pearl White. The smallness of the operation, the pervasiveness and persistence of the interrogation of employees about Union activities, and the apparent widespread knowledge of those activities among department heads, and the admissions of President Haddad and Darnell found above attest to the high degree of probability that they were well informed on the subject. It is not without significance that an employee immediately informed the store management as soon as the Union representatives appeared in the store to distribute literature in November, 1966. In particular, Burlingame's active support of the Union, his failure to assist management with information, and, especially, his securing cards from two department heads supports the inference that Respondent knew or suspected his involvement in the resurgent Union movement at the time. See Heck's, Inc., 150 NLRB 1565, footnote 2, and 1571.

Against the above is the fact, not disputed on this record, that Respondent did receive three different derogatory reports from its shoppers' service with respect to these two employees, the first two of which are clearly prior to the new or renewed Union activity of the employees. Nor is there any reason that Darnell's testimony should not be credited that these were the only two employees who received as many as three such adverse reports. In fact, they appear to be the only employees who were the subject of so many shoppers' reports of any kind. However, the force of Respondent's reliance on these reports in this case is much weakened, as has been considered above, by Respondent's own actions, which give evidence of the slight regard paid to the kind of derogatory comments involved here. Though Quinlan admittedly speaks to the employees in his store about unfavorable comments in such reports when he considers the occasion proper, it is clear that he does not consider that comments of the character here involved justify that attention. It is further noteworthy that Darnell, at a time when he was aware of at least two of the derogatory reports against Burlingame, asserts that because of his personal relationship with, and, it would seem, his confidence in Burlingame, requested Burlingame's assistance in seeking out and helping management rectify deficiencies in his department, a request which would appear more properly directed to the department head. It is difficult to believe that Darnell would have done this if he were seriously concerned about Burlingame, or that he would not have spoken to Burlingame about his own asserted deficiencies at the time, if he felt Burlingame was retrogressing, as is now contended, particularly in light of Darnell's past personal concern for Burlingame and his past efforts in Burlingame's behalf. It further appears that neither Darnell nor Quinlan considered that the final report on these employees, in December, justified immediate discharge, but waited to the end of the holiday season and the completion of inventory to terminate them.

Upon careful consideration of the record as a whole, and the above analysis, it is concluded and found that the Respondent discharged Burlingame and Perkins in order to discourage the then renascent Union activity among the employees, and that the shoppers' reports were seized upon as pretexts which could be used to justify that action.10/ Although Respondent was undoubtedly reducing the amount of its employees at the time, as Darnell asserts, the Trial Examiner is convinced that but for its anti-Union motivation, the Respondent would have retained these employees, as it had retained Perkins the previous year. It is therefore found that by discharging Charles W. Burlingame and Camillia Perkins, the Respondent violated Sections 8(a)(3) and (1) of the Act.

F. The Alleged Unlawful Refusal to Bargain

1. The refusal to bargain

On January 31, 1966, Union Representative Jack L. Brooks called Respondent's president, Haddad, on the telephone and asked Haddad to recognize the Union as the bargaining representative of the employees at the St. Albans store, excluding office clerical employees, guards, department heads, and supervisors, as defined in the Act. When Haddad stated that he doubted that the Union had any of the employees signed up, Brooks offered to show Haddad the Union authorization applications signed by the employees to demonstrate that the Union had been designated by a majority of the employees as their representative for collective bargaining. Haddad stated that he wasn't interested, and hung up the phone. The Union confirmed this conversation in a letter to Haddad, dated and sent the same day. In the letter, the Union reiterated its offer to deliver the signed authorization cards to Haddad in proof of the Union's representative status.

The Union's letter of January 31 was answered by Respondent's counsel, Holroyd, by letter dated February 3, 1966. Holroyd stated first that matters such as this should be brought to his attention in the first instance, rather than directed to Haddad, which, he stated, would serve to save time for all. The letter then continued:

> It will be necessary for us to decline recognition of your union at this time, because: 1. In light of the questionable methods of securing signatures on cards in the past, we doubt that you have an uncoerced majority. 2. Another union has advised us that it has a substantial interest in the St. Albans store and it would be improper for us to extend recognition on the basis of your demand. 3. The unit demanded by you is inappropriate for collective bargaining purposes. I suggest you use the normal Board process as set out in Section 9 of the Act to establish if you represent a majority of the employees in the appropriate unit.

10/ While the evidence of discrimination as to Perkins is not as strong as that pertaining to Burlingame, it is clear that in the circumstances of this case, Respondent could not have discharged Burlingame without also terminating Perkins.

Personnel Manager Darnell, the only witness for the Respondent who was questioned concerning Respondent's reasons for refusing to recognize the Union's claim of representation, testified that he had no personal, firsthand knowledge of the basis for Respondent's refusal. He stated that he was out of town when the Union request for recognition was received, and the request had been turned over to Holroyd by Haddad for reply before Darnell returned. Darnell's testimony indicates that Respondent, in fact, leaves these decisions up to their attorney, as Holroyd's letter to the Union, referred to above, would also indicate.

Darnell, however, testified that Respondent distrusted cards because "[s]ome of the cards we had had in other hearings had been thrown out because they were, the names were supposedly forged on them. The writing was in two different peoples' handwriting and things like this." Inasmuch as Darnell gave no further evidence or details with respect to this, careful consideration has been given to all of the decisions previously referred to with respect to this matter. These show that proof of cards executed by employees of the Respondent in favor of labor organizations was made in six of the eight cases involving the Respondent. Four of these involved the Union, one being the Trial Examiner's Decision in Case 9--CA--4185, which has not been passed on the Board. In only one of these cases does it appear from the Decision that any question concerning the authenticity of the writing on the face of the cards was raised, and in that case, 159 NLRB No. 104, the only question concerned the accuracy of the dates on three cards. In that case, Trial Examiner Lipton credited the testimony of three employees that they had signed their cards on a date different from that appearing on the card, based upon a visual inspection of the cards, the record as a whole, and apparent abandonment of the issue in the brief of the General Counsel. See TXD at p. 5.

It is also contended that Darnell was informed that one employee, Carolyn Edens, had signed a card only after receiving an anonymous telephone threat. Darnell testified that he discussed this with Holroyd and Haddad, but testified that he was unable to say that this occurred before the time that Holroyd sent his letter of February 3, 1966, to the Union. For this reason, and because Darnell admittedly did not have probative knowledge of the basis for the refusal to recognize the Union, this contention is entitled to no weight. Neither Haddad, nor Holroyd, who would appear to have firsthand knowledge of the facts, testified.

2. The appropriate unit

The complaint in Case 9--CA--3828 in this matter alleges that an appropriate unit for the purposes of collective bargaining under the Act consists of "all employees of Respondent's St. Albans, West Virginia store, excluding warehouse employees, the store manager, assistant store manager, office clerical employees and all guards, professional employees and supervisors as defined in the Act."

At the hearing, the Respondent stated that it agreed with the wording of the complaint, except that it would include the clerical employees and the warehouse employees in the unit. In its brief, the Respondent agrees that the three warehouse employees should be excluded from the

unit.11/ The General Counsel, in his brief urges that the scope of the unit be found in accordance with the Board's past decisions. This is also basically the Respondent's position.

In its most recent decision with respect to Respondent's operations, 166 NLRB No. 38, the Board found appropriate a unit of warehousemen and truckdrivers employed at several of Respondent's locations, including St. Albans, excluding other employees, which supports the parties' agreement that the warehouse employees be here excluded from the store unit. Further, although the Board excluded clerical employees from a store unit in an early decision involving Respondent's operations, 156 NLRB 761, the Board has more recently held that clerical employees should be included in the unit in Respondent's stores. See 159 NLRB No. 104; 166 NLRB No. 32. It is therefore held that the two office employees at the St. Albans store should be included in the appropriate unit here involved.

At the hearing, a number of issues were raised with respect to the inclusion or exclusion of specific employees from the appropriate unit on January 31, 1966, the date of Respondent's refusal to recognize the Union as the collective-bargaining representative of the employees in the appropriate unit. Only three of these need to be considered herein.

Employee Wanda Kanedy was absent from work on January 31, because of illness. Respondent's position is that employees who are absent from work more than 2 or 3 days because of illness are dropped from the payroll and are rehired only if there is a place available when they return and Respondent considers such persons satisfactory employees. Respondent contends that it grants no leave of absence for sickness for more than a short period. The record shows that Kanedy had advised Respondent she would be in the hospital for about 6 weeks. When she returned, she was immediately put back to work. Kanedy testified that she was not told that she was to be terminated, that it was her understanding, though not specifically stated by the store manager, that she was to have her job back when she returned, and she was put back to work without filling out any further papers.

The record is replete with evidence of employees who were returned to work after absences of varying periods for sickness. In fact, Darnell conceded that he did not know of any instance in which an employee absent for sickness was refused employment when she returned, either immediately or shortly after the employee advised that she was ready to return to work.

The issue to be decided here, clearly, is whether on the critical date there was a reasonable expectation that Kanedy would be put back to work when she returned from the hospital in 6 or 7 weeks. See N.L.R.B. v. Atkinson Dredging Company, 329 F.2d 158 (C.A.4, 1964) (particularly Walton Gillikin). This must be determined on the basis of the record as a whole, and not merely, as Respondent argues, on its payroll practices, which are apparently unkown to the employees involved. Since the record as a whole plainly supports the finding that there was a reasonable expectancy that

11/ Respondent's brief, marked as Trial Examiner's Exhibit 1A, and General Counsel's brief, marked as 1B, are hereby received into evidence.

the Respondent would put her back to work when she returned from the hospital, as in fact occurred, it is found that on the critical date Kanedy was an eligible employee within the appropriate unit.

Respondent contends that employees Judy Raynes and Albert Kessel should be included in the unit on the critical date because its records show that these employees completed the necessary forms for employment on January 24, 1966, and were put on Respondent's employment records. The General Counsel contends that they should not be included in the unit on the basis that they did not start to work until after the critical date. See Colecraft Mfg. Co., Inc., 162 NLRB No. 69, TXD section III, E.

Respondent keeps its payroll records on a 2-week basis. Darnell testified that it could not be determined from the payroll records which he had on the witness stand when these two began work, but that it was clear that they did not work the full 2-week pay period from January 24 to February 5, 1966. Respondent later produced timecards for these two employees which were received in evidence. Although these timecards do not show any dates except that they are for the pay period ending February 5, 1966, Kessel's card makes it plain that he started work on Wednesday, January 26, 1966, and he is properly included in the unit.

Raynes' timecard, however, shows merely that she worked on a Thursday, Friday, and Saturday in the 2-week period. Since there is no presumption that this was the Thursday before January 31 rather than the Thursday following, it must be found that there is insufficient evidence that Raynes was employed on the critical date and she must be excluded from the eligibility list. Indeed, if any inference or presumption may be drawn from Raynes' card, it might be that she started work on the Thursday following January 31, since, in the absence of any reason for a break in her employment, this would indicate the beginning of her work with Respondent at the store.

As indicated above, after the close of the hearing, Respondent filed a motion with the Trial Examiner to reopen the record to permit it to introduce additional evidence to show that the appropriate unit in this proceeding was one including all of Respondent's stores, in accordance with the opinion of the Court of Appeals for the First Circuit in N.L.R.B. v. Purity Food Stores, Inc., 376 F.2d 497 (C.A. 1). This motion was denied by the Trial Examiner on the grounds that the legal principle involved was not new and, indeed, had been indicated in a prior decision of the same Court involving the same employer; and further there was no claim that the evidence proffered was newly discovered or otherwise previously unavailable.12/

12/ Respondent's motion has been marked Trial Examiner's Exhibit 2A, the General Counsel's opposition is marked 2B, and the ruling on the motion has been marked Trial Examiner's Exhibit 3, and are hereby received into evidence. In its brief, Respondent suggests that one employee whose eligibility was stipulated by all parties at the hearing should be excluded from the unit as a supervisory trainee. Since this was not litigated at the hearing, and no basis appears for Respondent's position, it is rejected.

On the basis of the record as a whole, it is found that an appropriate unit for the purposes of collective bargaining within the meaning of the Act is "all employees of Respondent's St. Albans, West Virginia, store, including office clerical employees, but excluding warehouse employees, guards, professional employees, the store manager, assistant store manager, and all other supervisors, as defined by the Act."

3. The Union's majority status

As of January 31, 1966, the date of the Respondent's refusal to recognize the Union, the appropriate unit found above, including Wanda Kanedy, Albert Kessel, and Pearl White, but excluding Judy Raynes, numbered 41 employees. Of these employees, the record shows that 23, prior to January 31, had signed applications unambiguously authorizing the Union to represent them in collective bargaining for their working conditions.

Respondent contends that a number of these authorizations should not be counted because they were proved in this proceeding through the testimony of persons who witnessed their execution rather than by the person who signed the authorization. However, it has long been settled that these documents may be authenticated by witnesses other than those who signed them. Colson Corporation v. N.L.R.B., 347 F.2d 128 (C.A. 8, 1965).

At the hearing, it was contended that the application signed by Carolyn Edens was invalidated by an anonymous telephone threat which is alleged to have led her to sign her Union authorization. However, even if her card is eliminated, the Union's majority status as of January 31, 1966, is not affected.

It is therefore clear, and it is found, that the Union was on January 31, 1966, and at all times material to this proceeding, the designated and selected representative of a majority of Respondent's employees in the appropriate unit found herein.

4. Analysis and conclusions with respect to the refusal to bargain

In its brief, the Respondent contends that the allegations of the complaint that the Respondent refused to bargain with the Union in violation of the Act should be dismissed on three grounds: first, because the unit alleged in the complaint inappropriately excludes clerical employees from the unit, and "accordingly [the Respondent] had no duty to recognize" the unit or the demand based upon it. Secondly, it is contended, as noted above, that there was insufficiency of proof of the Union's majority status because not all authorizations were identified by their signers. And lastly, it is argued that the refusal-to-bargain allegations should be dismissed on the ground that the procedure of establishing the Union's status on the basis of signed authorizations is not the best method, and deprives the employees of the right to express their desires in a secret-ballot election, with an opportunity for the employer to explain "the other side of the picture" from that presented by the Union.

The alleged material variation in the appropriate unit complained of need not detain us long. This issue was not raised by Haddad when he refused to recognize the Union, and the inclusion of the two clericals involved does not materially change the unit in which the demand was made, and does not affect the Union's majority status.13/

Respondent, finally, argues that the unreliable nature of authorization cards as proof of majority status should preclude any finding that the Union is the designated bargaining representative of the employees. The Trial Examiner is in complete agreement that the results of a free and fair secret-ballot election is much to be preferred over any other type of evidence in determining whether employees wish to be represented by a labor organization. However, this does not mean that authorization forms are not probative evidence in these cases, as many decisions of the Board and Courts inform us.

It is also a familiar rule of law that when the party calling for the best evidence of a fact has itself made the production of such evidence impossible, it cannot complain that proof of that fact is made by secondary, but probative, evidence. Here Respondent by its own actions made impossible the ascertainment of its employees' desires as to representation in the atmosphere of a free and fair election, and thus may not be heard to complain if that fact is ascertained through other probative evidence.

Nor can there be any question but that the Respondent was motivated in refusing to recognize the Union here, not by any concern over whether the Union actually possessed authorizations to represent its employees, but by a desire to avoid, by whatever means possible, dealing with the Union for the working conditions of its employees.14/ Since the means employed to accomplish that purpose consist of acts violative of the rights of the employees involved, the Respondent must be held to have refused in bad faith to recognize and bargain with the Union as the collective-bargaining representative of its employees. Therefore, on the evidence

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13/ Consideration has also been given to the point, not raised by Respondent, that it is not clear from the Union's demand that the warehouse employees were excluded from the unit it sought to represent. However, the Union's position at the hearing, in accordance with the complaint, was that such employees should be excluded from the appropriate unit, and since the Respondent in its brief agrees and raises no issue on the point, it is concluded this was not an impediment to recognition of the Union at the time of its demand.

14/ Although not discussed in Respondent's brief, it has been noted that in its letter of February 3, 1966, Respondent claimed a doubt of the Union's authorizations because of "questionable methods of securing signatures on cards in the past." This is nowhere explained, and apparently has been abandoned. By its terms it would not refer to the alleged incident with respect to Mrs. Edens, and, as previously noted, there is no evidence that Respondent knew of that alleged event prior to February 3, 1966. Other than this, no claim of invalidity of the authorizations received in evidence appears.

in the record as a whole, and for the reasons set forth, it is found that the Respondent, by refusing to bargain with the Union on January 31, 1966, and thereafter violated Sections 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit set forth in this Decision in section III, F, 2, is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. On January 31, 1966, and at all times thereafter, the Union was, and continues to be the exclusive representative of the employees in the appropriate unit found above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent has engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(1), (3), and (5) of the Act, which unfair labor practices affect commerce within the meaning of Sections 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Since it has been found that the Respondent has promulgated and is enforcing rules prohibiting employees from engaging in solicitation for labor organizations on Respondent's premises on their own time, and from distributing literature on their own time away from actual working areas, it will be recommended that Respondent rescind and cease promulgating and enforcing such rules.

It will be further recommended that Respondent offer Charles W. Burlingame and Camillia Perkins immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to seniority and other rights and privileges, and make them, and Pearl White and Jerald Doss, whole for any loss of earnings, or other benefits, they may have suffered by reason of the discrimination against them, by payment to them of a sum of money equal to that which they would have earned as wages, or received as benefits, from the date of the discrimination against them to the date of offer of reinstatement, less interim earnings in a manner consistent with Board policy set out in F. W. Woolworth Company, 90 NLRB 289, and Crossett Lumber Company, 8 NLRB 440, to which shall be added interest at the rate of 6 percent per annum, as prescribed by the Board in Isis Plumbing and Heating Co., 138 NLRB 716.

It will also be recommended that the Respondent preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and reports, and all other records and reports necessary to analyze the amount of backpay due and the right to reinstatement under the terms of these recommendations.

In order to make effective for the employees of the Respondent the guarantee or rights contained in Section 7 of the Act, it will be recommended that the Respondent cease and desist from, in any manner, infringing on the rights guaranteed in that Section.

RECOMMENDED ORDER

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that:

Respondent, Heck's, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, transferring, refusing to employ, or otherwise discriminating against employees in order to discourage membership in or support of Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL--CIO, or any other labor organization.

(b) Threatening its employees with discharge or other reprisals if they become or remain union members or give assistance or support to a union.

(c) Interrogating employees concerning union membership or activities in a manner which interferes with their rights under the Act.

(d) Engaging in or creating the impression of surveillance of the union activities of its employees.

(e) Inducing, instructing, or encouraging employees to ascertain or report on the union membership or activities of employees.

(f) Promulgating, continuing in effect, or enforcing rules or conditions of employment prohibiting employees from soliciting on behalf of a union while on Respondent's premises, while on their own time, or from distributing union literature on Respondent's premises, on their own time and away from the actual working area.

(g) Refusing, upon request, to bargain collectively with Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL--CIO, as the exclusive representative of the employees in the appropriate unit found herein, for the rates of pay, wages, hours of employment, and other terms or conditions of employment of said employees.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Upon request bargain collectively with Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL--CIO, as the exclusive representative of the employees in the unit herein found appropriate with respect to rates of pay, wages, hours of employment, and other terms or conditions of employment, and if an agreement is reached, embody such understanding in a signed agreement.

(b) Insofar as its published rules or conditions of employment, prohibit employees from soliciting on behalf of a union on Respondent's premises, while on their own time, or from distributing union literature on Respondent's premises, on their own time and away from the actual working area, rescind such rules.

(c) Offer Charles W. Burlingame and Camillia Perkins immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to seniority and other rights and privileges, and make them, and Pearl White and Jerald Doss, whole for any loss of earnings or other benefits they may have suffered by reason of the discrimination against them, as set forth in the section of this Decision entitled, "The Remedy."

(d) Preserve and upon request, make available to the Board or its agents the records necessary to determine the adequacy of reinstatement and the amounts of backpay provided for in this Recommended Order.

(e) Post at its St. Albans, West Virginia, store, involved herein, copies of the attached notice marked "Appendix."15/ Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Respondent or its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

15/ In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

(f) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.16/

IT IS FURTHER RECOMMENDED THAT except to the extent found herein, the allegations of the complaint are dismissed.

Dated at Washington, D.C.

16/ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT discharge, or refuse to employ you, or transfer you, or treat you differently in any way because you join or help Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL--CIO, or any other union.

WE WILL NOT spy upon or attempt to watch your Union meetings or any Union activities, or try to make you feel that we are spying upon or watching your Union activities.

WE WILL NOT ask you to find out for us about Union meetings or Union activities, or to tell us who is for or against the Union, or about any Union activities.

WE WILL NOT threaten you with discharge or transfer or with any other kind of harm because you join or help a labor union.

WE WILL NOT prohibit you from soliciting for a union on company property on your own time.

WE WILL NOT prohibit you from passing out or receiving Union literature on company property so long as this is done on your own time and away from actual working areas.

WE WILL NOT in any other way interfere with your right

To organize yourselves
To form, join, or help unions
To bargain for your working conditions as a group through a representative chosen by a majority of you
To act together for mutual aid or protection in your working conditions.
To refuse to do any or all of these things

WE WILL, upon request, bargain with Food Store Employees Union Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL--CIO, for your working conditions in the appropriate unit set forth below:

> All employees of the Company's St. Albans, West Virginia, store, including office clerical employees, but excluding warehouse employees, guards, professional employees, the store manager, assistant store manager, and all other supervisors, as defined by the Act.

WE WILL offer to Charles W. Burlingame and Camillia Perkins immediate and full reinstatement to their former jobs, or to a substantially equivalent job, without loss of seniority or any other right or privilege and WE WILL make them, and Jerald Doss and Pearl White whole for any pay they lost because of the discrimination against them, with interest.

HECK'S, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 684--3686.

171 NLRB No. 112

D-452
Huntington, W. Va.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HECK'S, INC.

and

Case No. 9-CA-4185

FOOD STORE EMPLOYEES UNION,
LOCAL NO. 347, AMALGAMATED
MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA,
AFL-CIO

DECISION AND ORDER

On August 1, 1967, Trial Examiner Arthur E. Reyman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations[1/] of the Trial Examiner, as modified below.

1/ The Trial Examiner found that Sue Bess, a supervisor, told an employee that she /Bess/ had been told to observe the employees and report any union activity to the store manager. Accordingly, we shall modify the Trial Examiner's Recommended Order to reflect the violation of creating an impression of surveillance and delete that portion which indicates a finding that the Respondent had in fact engaged in surveillance.

We agree with the Trial Examiner's conclusion that the poll of the employees violated Section 8(a)(1) of the Act.[2/] The evidence clearly indicates that few, if any, of the employees polled received assurances that no reprisals would be taken because of their answers to the poll. Accordingly, and even without considering the application of Struksnes Construction Co., Inc.,[3/] which issued after the polling in this case, we conclude that this polling violated Section 8(a)(1) under the standards as set forth in Blue Flash Express Co.[4/]

In 1965 the Respondent conducted a similar poll of the employees in the same unit, and the Board and the Court found that polling to be unlawful. Heck's, Inc., 159 NLRB 1151, enfd. 387 F.2d 65 (C.A. 4). In that case the complaint also alleged a violation of Section 8(a)(5) which we dismissed finding that the Union did not represent a majority of the employees in the unit, noting in footnote 1 of that decision that even if majority status had been attained, the interrogation was not so flagrant that it necessarily had the object of destroying the Union's majority status, citing Hammond & Irving, Inc., 154 NLRB 1071, 1073. Although the Respondent's conduct was similar herein, we agree with the Trial Examiner that in the present case the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.

We cannot, at this time, overlook a course of conduct engaged in by this Employer on a companywide scale. The Board has, in eight different cases,

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2/ The Trial Examiner erroneously recapitulated the results of the Respondent's poll. However, as we have found that the poll was coercive and violative of Section 8(a)(1) of the Act, the results obtained are immaterial and cannot support any asserted good-faith doubt of the Union's majority.

3/ 165 NLRB No. 102.

4/ 109 NLRB 591.

found this Employer has violated the Act.[5/] The violations have included polling similar to that in the instant case, threats, interrogation, and discriminatory discharges. The Respondent operates several retail stores, all located in western West Virginia, and nearby Ashland, Kentucky and most, if not all, of these stores have been the site of unlawful conduct. Employees at all stores receive a monthly company publication, which, on occasion, has been utilized to comment upon union organizational developments.[6/] President Haddad actively participated in conduct found to be unlawful in five of the cases set forth in footnote 5, although not in the instant case. Vice-president Darnall has engaged in unlawful conduct in five of these cases, and has again engaged in unlawful conduct in the present case.

It is clear that the Respondent has the same labor relations policy affecting all employees at all of its stores,[7/] and this policy is based, in part, on opposition to the freedom of choice by its employees in regard to collective bargaining. It is also apparent that the company newsletter, the proximity of the stores, and the active participation of top company officials in carrying out this illegal labor policy, all have the effect of emphasizing individual incidents of unlawful conduct. The repetition of conduct which had earlier been found unlawful at this same store and to many of the same employees further indicates a disregard for the policies of the Act, and the impact of such repeated conduct therefore is much greater than in the initial incident.

Upon review of all the relevant factors herein, we conclude that the Employer's unlawful conduct in this case is amplified by, and is part of

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5/ Heck's Discount Store, 150 NLRB 1565, enfd. 369 F.2d 370 (C.A. 6); Heck's, Inc., 156 NLRB 760, enfd. in part 386 F.2d 316 (C.A. 4); Heck's, Inc., 158 NLRB 121, enfd. 387 F.2d 65 (C.A. 4); Heck's, Inc., 159 NLRB 1151, enfd. 387 F.2d 65 (C.A. 4); Heck's, Inc., 159 NLRB 1331, consent decree entered, June 13, 1967, (No. 11, 390, C.A. 4); Heck's, Inc., 166 NLRB No. 32; Heck's, Inc., 166 NLRB No. 38; Heck's, Inc., 170 NLRB No. 53.

6/ Heck's, Inc., 159 NLRB 1151, 1156 at footnote 16.

7/ Ibid.

its companywide antiunion policy,[8] and its impact must be evaluated in the context of its prior flagrant unlawful practices. Such conduct clearly reflects a rejection of the collective-bargaining principle. As we have found that the Union did in fact represent a majority of the employees, we conclude that the Employer's conduct in this case was designed solely to avoid its collective-bargaining obligation, and a bargaining order is an appropriate remedy for its violation of Section 8(a)(5) and (1) of the Act.[9]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that the Respondent, Heck's, Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete from paragraph 1(b) of the Trial Examiner's Recommended Order the words "engaging in" and substitute therefor the words "creating the impression of . . ."

2. Delete from paragraph 2(b) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefor "on forms provided . . ."

Dated, Washington, D. C.

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

8/ See N.L.R.B. v. Overnite Transportation Co., 308 F.2d 284, 286-287 (C.A. 4) enforcing 129 NLRB 261.

9/ Hammond & Irving, Incorporated, 154 NLRB 1071.

TXD-439-67
Huntington, W. Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

HECK'S, INC.

and

Case No. 9-CA-4185

FOOD STORE EMPLOYEES UNION,
LOCAL NO. 347, AMALGAMATED
MEAT CUTTERS AND BUTCHER
WORKMEN OF NORTH AMERICA,
AFL-CIO

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Relations Board.
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Charleston, W. Va., for Heck's,
Inc.
Messrs. Jack L. Brooks and Woodrow R.
Gunnoe, each of Charleston, W. Va.,
for Food Store Employees Union, Local
No. 347, Amalgamated Meat Cutters and
Butcher Workmen of North America,
AFL-CIO.

TRIAL EXAMINER'S DECISION

ARTHUR E. REYMAN, Trial Examiner: This is a proceeding under Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. 151 et. seq., herein called the Act.

On February 13, 1967, Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, herein sometimes called the Union, filed a charge against Heck's, Inc., herein sometimes called the Respondent or the Company, the charge setting forth certain acts alleged to have been committed by the Respondent resulting in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. On April 21, 1967, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Ninth Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, issued a Complaint and Notice of Hearing, the Complaint alleging, inter alia, that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act. The Respondent filed timely Answer to the Complaint, effectively denying that it had engaged in or was engaging in unfair labor practices, as alleged in the Complaint. Pursuant to Notice of Hearing, this case came on to be heard before me at Huntington, West Virginia, on June 13, 1967. The hearing was closed on the same day. At the hearing, the General Counsel and the Respondent were represented by counsel and the Charging Party, the Union, was represented by two of its representatives. Each party was afforded full opportunity to be heard, to call and examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to present oral argument and to file briefs. Briefs filed on behalf of the General Counsel and the Respondent after the hearing have been carefully considered.

Upon the entire record, and from my observation of the witnesses appearing before me, I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is a West Virginia corporation engaged in the retail sale of various merchandise including ready-to-wear clothing, sporting goods, hardware, household goods, toys and cosmetics at various locations in the States of West Virginia and Kentucky. The Respondent's Huntington, West Virginia, Fifth Avenue store is the only location involved in this proceeding. During the 12 months immediately preceding the issuance of the Complaint herein, a representative period, the Respondent, in the course and conduct of its business operations, had a gross volume of retail sales in excess of $500,000. During the same period, the Respondent had a direct inflow, in interstate commerce, of materials, goods and products valued in excess of $50,000, which it purchased and had shipped directly to it in West Virginia, from points outside of that State.

At all times material herein, the Respondent is and has been an "employer" as defined in Section 2(2) of the Act, engaged in "commerce" and in operations "affecting commerce" as defined in Section 2(6) and (7) of the Act, respectively.

II. The Union Involved Herein

Food Store Employees Union, Local No. 347, Amalgamated Meatcutters and Butcher Workmen of North America, AFL-CIO is and has been at all times material herein a labor organization as defined in Section 2(5) of the Act.

III. The Unfair Labor Practices

Union Organizational Efforts

After the Union began an organizational drive among the Respondent's employees at its Huntington Fifth Avenue store, in the latter part of December, 1966, Jack L. Brooks, business representative of the Union, on January 16, 1967 1/ together with Russell Skaggs and Woodrow R. Gunnoe, two other business representatives of the Union, called at the Fifth Avenue store; Gunnoe and Skaggs entered and Brooks followed them into the store 2 or 3 minutes later. Skaggs and Gunnoe, after they had entered the store, distributed a letter to the employees; Brooks followed them into the store and passed out another letter, and after Brooks had passed out several of the copies of the letter held by him, Tim Crager, the store manager, approached him and told him that he could not distribute such literature within the store. Brooks testified, as follows:

> Mr. Crager told me I could not pass the letters out. And I told him I was sorry but I had already passed them out. And I asked him who he was, the manager or the assistant manager. And he replied that he was the manager. And I extended my hand to him and introduced myself. Also introduced him to Mr. Gunnoe who was standing along beside me. I told him that we represented a majority of these employees at the Fifth Avenue store in a unit consisting of all employees, including office clerical employees, but excluding guards, department heads, and supervisors as defined in the Act. And I was asking him for recognition and bargaining on behalf of those

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1/ Unless otherwise specifically noted, all dates hereinafter mentioned are for the year 1967.

employees. I also stated to him that I had the cards with me for a checking if he desired to see them. He said he didn't think there would be any need for that because he couldn't recognize the Union. And before that could be done he would have to get in touch with the main office. I told him that would be all right, that we could wait for his answer. So he asked if we could wait a few minutes and he excused himself and went to the office. He came back in about 5 minutes and told us that he had not been able to reach Mr. Fred Haddad /president and general manager of the Company/ or Mr. Holroyd /attorney for the Company/. * * * Mr. Crager said that he had not been able to reach either one of them and he would not be able to recognize us. And I said, well, are you refusing to recognize the Union as a representative of the employees. He said, I think that had better be done by the main office. And Mr. Gunnoe spoke up about that time. And offered to show him the cards. In fact, he reached in his pocket and extended the cards to him and asked that he check them. And he refused, saying that I don't doubt that you have the majority, but I can't recognize a union. It will have to be done by the main office. I asked Mr. Crager if he would tell whoever he must that we were in and asked for recognition in bargaining. He said that he would and he asked where he could get in touch with us. And I gave him our mailing address and also our telephone number. He said that he would notify the Company. We left the store at about 4:05 p.m.

The testimony of Gunnoe is in accord with that of Brooks, Gunnoe relating the passing out of the letter of January 12 by him and Skaggs and being told by the assistant manager at the store that "I could not pass that junk out in the store." Gunnoe and Skaggs overheard the conversation between Brooks and Crager.

Under date of January 17, Brooks addressed a letter to Haddad to Nitro, West Virginia, which read as follows:

> Dear Sir:
>
> This letter will confirm the conversation I had yesterday with your store manager of the Fifth Avenue store in Huntington, West Virginia. I informed Mr. Crager that our Union represented a majority of his employees at the Fifth Avenue store in a unit consisting of all employees including office clerical employees, but excluding department heads, guards and supervisory employees. It will also confirm that the employee's authorization cards were offered to him and extended to him for his checking against the payroll to prove our majority status. It will further confirm that I asked him for recognition and bargaining on behalf of the employees in the above-named unit.
>
> Mr. Crager told me that he could not grant us recognition--that it would have to come through the main office. He also stated that the checking of the authorization cards would have to be done through the main office. I asked Mr. Crager to pass our demand on

to you, and he said that he would do this. I am again making the same demand by this letter.

Please advise.

No answer from the Company was ever received by the Union.

The Complaint alleges that all employees of the Respondent's Huntington, West Virginia, Fifth Avenue store, including office clerical employees, but excluding the store manager, assistant store manager, and all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act. The unit was stipulated to be a proper one in this case, it being of the same description as that involved between the same parties in 159 NLRB No. 104. The Respondent submitted a payroll list for the payroll period beginning January 15 and ending January 28 bearing the names of some 38 employees, the date employed and termination dates. Thirty-eight names of employees appear on this list, including the names of seven employees who, the parties stipulated, were supervisors within the meaning of the Act. 2/ On January 16, when the three union representatives appeared at the Fifth Avenue store, they had signed authorization cards from employees in their possession, these 19 cards having been signed on various dates between December 28, 1966, and January 10, 1967.

On January 17, the day Business Representative Brooks addressed his letter to Company President the unit, excluding seven agreed-upon supervisors and Morrison would have consisted of 30 employees, 16 of whom would have constituted a majority within the unit. 3/ Thus, without regard to the supervisory status of Morrison, whose name appears in the margin hereof, the unit would have been comprised of 31 employees, a majority would be 16 employees, showing that the Union held a margin of 3 signed cards over the necessary majority. Therefore, the Union held a card majority of 4. The signatures on the cards were obtained through the

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2/ The name of another employee, Louise Morrison, also appears upon this list. The General Counsel and the Union contended that employee Morrison as head cashier at the time the demand for recognition was made was a supervisor; the Respondent, on the other hand, then questioned whether she was a supervisor because she had not at the time been made head cashier. Later, during the course of the hearing the parties agreed by stipulation that at all times material herein employee Louise Morrison was a supervisor as defined in the Act and hence should be excluded from any found appropriate unit.

3/ These cards are in evidence. Linda Berry, an employee within the unit, signed a card which is dated January 29. The form of the authorizations signed by the employees is as follows:

A P P L I C A T I O N

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347
P.O. Box 2751 Telephone 346-9679 Charleston, W. Va.

The undersigned hereby authorizes this union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions.

This form contained blank spaces for the Company's name, the name of the employee, the Company address, the street address of the employee, the date of the card, the name of the city and state, a line for the signature of a witness and another line for the telephone number of the employee.

solicitation of Gunnoe and Skaggs, sometimes singly or sometimes by the two of them. The signatures affixed to these cards were by each individual employee, away from his or her place of employment, usually at the home of the employee. The authenticity of the cards is established by the testimony of the Union representatives. I. Taitel & Sons, 119 NLRB 910, 912, 261 F. 2d 1, (C.A. 7) cert. denied 359 U.S. 944; Hopcon, Inc., 161 NLRB No. 1; Biles-Coleman Lumber Co., 4 NLRB 679, 689, 98 F. 2d 18 (C.A. 9). Here there is no claim or proof that misrepresentations were made in securing the employees' signatures. Cf. N.L.R.B. v. Winn-Dixie Stores, Inc., 341 F 2d 750, 755 (C.A. 6) cert. denied 382 U.S. 830 /143 NLRB 848/. 4/

I find that the Union held a clear majority on January 16 and 17, and thereafter. Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to provisions of Section 9(a)." Section 9(a) provides that "representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining * * *" Although Section 9(c)(1) provides machinery by which the question of representative status may be determined in a Board-conducted election, it has long been settled that an election is not the only means by which representative status may be established. See United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62, 71-72, and cases cited at nt. 8 therein. There is no absolute right vested in an employer to demand an election. Where a Union has obtained authorization cards signed by a majority of the employees in an appropriate unit, designating the union as their bargaining representative, an employer violates Section 8(a)(5) if, absent a good faith doubt of the union's majority status, he refuses to bargain with the union. Allegheny Pepsi-Cola Bottling Co. v. N.L.R.B., 312 F. 2d 529, 532 (C.A. 3); N.L.R.B. v. Barney's Supercenter, Inc., 296 F. 2d at 94; N.L.R.B. v. Dahlstrom Metallic Door Co., 112 F. 2d 756, 757 (C.A. 2). The Company is not excused from the obligation to bargain because the Union filed a petition for representation and later withdrew its petition to file the unfair labor practice charge in the instant case. N.L.R.B. v. Epstein, 203 F. 2d 482, (C.A. 3), cert. denied 347 U.S. 912; N.L.R.B. v. Gotham Shoe Mfg. Co., Inc. 359 F. 2d 684 (C.A. 2).

The Company Conducted Poll

Ray O. Darnall Company Vice President in charge of operations and personnel manager, testified that after receiving the January 17 letter of Brooks, he "came to Huntington and conducted a poll of all the employees in the Fifth Avenue store." He said that he polled each individual employee; that he had written down "exactly what I was going to say to the employees. Because we had had an unfair labor practice charge thrown at us on a previous occasion. So I wanted to be sure that I did read exactly what I had to say to the employees." He said that the statement he proposed to read and later did read to the employees was written by him in his office before leaving Charleston, was written on January 21, that the language was his own and made by him without consultation with any other person. This statement, which he said was read January 21 to individual employees at the Huntington Fifth Avenue store, was as follows:

> As you must know the Union has made a demand on the Company stating that they represent the majority of the employees. I am going to ask you a question but, before I ask I want you to know that you do not have to answer and it will not have any effect on your job. Do you want the Union to represent you?

4/ On February 2, the Union filed a petition for certification of representative of the employees in the bargaining unit described above, such petition thereafter being allowed to be withdrawn or dismissed upon the filing of the unfair labor practice charge. Case No. 9-RC-7134.

This statement was carried on a clipboard with the list of all of the names of the employees at the store. In the words of Darnall: "I had the list of the employees on the clipboard with me. At the same time I also had the question that I was going to ask them on the same clipboard. And I read this to them. And when they gave me their answer I put their comment out from their name."

Thirty-seven employees, including the eight supervisors, were read this question and their answers recorded. The result was 22 noes, 12 yeses, and 3 "no comment." Each of the eight supervisory employees were recorded as having said "no."

In response to a question from counsel for the Respondent as to whether he had formed an opinion as a result of taking the poll in referrence to the Union's demand and its claim that it represented a majority of the employees, Darnall said "from this poll I determined that the Union did not represent a majority of our employees."

The record does not disclose whether, in forming his opinion, Darnall excluded the then seven recognized supervisors and the three "no comment" answers given to him. If he had, obviously the result of the poll would show 12 "yes" against 12 legitimate "noes." Had he considered Morrison a supervisor in his count, as she was, then a Union majority would have been shown by his own count.

The manager of the Fifth Avenue store, Tim Crager, 5/ testified that he accompanied Darnall when the latter questioned the employees about whether or not they wanted a union to represent them and heard what he said and heard their answers. In the words of Crager:

> He went to each employee and asked him, told them he would like to ask them a question, said as you may or may not know that the Union has made a demand on the Company. And says you don't have to answer the question. And it would /not/ affect their job. And he did state that they did or did not have to answer the question.

John Schoolcraft, an employee in the hardware department, testified that he had signed a union authorization card. In respect to the poll, he testified:

> Well, Mr. Darnall called me over to ask me a question. He said he had a question he'd like to ask me. And I don't recall the exact words, but something to the effect that he presumed that I knew about the Union activity and that he wanted to know my opinion of whether I would want the Union to represent me or Heck's to represent me. And I answered yes, that I would like the Union to represent me. * * * Mr. Darnall had a clip board with a yellow clip pad on it with names in columns. I assumed it was names of people in the store. And he made a mark out from my name.

Schoolcraft was emphatic in denying that either Darnall or Crager had told him that his job would not be affected by his answer to the question presented to him

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5/ This name appears in the transcript of this case as here spelled. In the Respondent's brief and elsewhere it is spelled "Creager."

Denver Holley, an employee in the hardware department, testified that he had signed a union authorization card, and that he was questioned by Darnall and Crager in the stock room of the store. He said:

> As I walked back into the stock room, it was about 3 or 3:15, 3:20, I don't remember the exact time, I saw Mr. Darnall and Mr. Crager back there. Well, he also saw me, and Mr. Darnall told me, he said, Mr. Holley, I don't believe I've got you yet. And I said, no, sir, you haven't. He walked up to me and he said, you want the Union to represent you. And I said, yes, I do. He said, thank you, Mr. Holley. And that was all that was said.

Richard Blevins, an employee in the warehouse and a truck driver, testified that he had signed a union card; that he was approached by Mr. Crager and "another gentleman" who " . . . asked me if I wished to have the Union represent me as bargaining agent. I told them yes. And that was all the question that was asked me concerning that." He did not recall either of the two men who spoke to him saying that without regard to how he answered, his job would not be affected.

Margie Holley, the wife of Denver Holley, employed in the clothing department, testified that she had signed a union authorization card and also had obtained the signature of Virginia Edwards to a card which she said Edwards had signed in her presence. She testified further that on January 21, at about 3:15 p.m., she was approached by Darnall and Crager; that Darnall told her he wanted to speak to her for a moment, asked her if she wanted the Union to represent her, that she replied "yes," and he thanked her and walked away.

Linda Jett Harshbarger, employed as a cashier for approximately 9½ months, testified that she had signed a union authorization card at her home at the request of Skaggs and Gunnoe and was questioned by Darnall and Crager. She said that Darnall came up and questioned her, that he had a clip board, that he was talking about something and that "all I could make out was whether I wanted the Union to represent me. And I told him that I had signed it. And by that I meant I'd sign the union card. And that was all. He said, thank you, I believe, and walked on." In answer to a question as to whether Darnall had asked her anything before he asked her if she wanted the Union to represent her, she said "he was, he had something on a clip board and he was talking about it and pointing to it. But I didn't pay much attention." She said she noticed he had some names "where he was checking off."

It should be noted that in connection with the testimony of the above named witnesses who in effect testified that Darnall had not read the complete statement before he asked the question he said he did, on cross-examination counsel for Respondent (properly) attempted to establish that at the time each of these employees signed a union card, the Union representatives represented to them that there would be an election to determine whether the employees desired to have the Union represent them as their bargaining agent. The most I can draw from the result of the cross-examination is that the Union representatives explained that the Union could be designated either by a card majority or could adopt the election procedure. I have no doubt concerning the credibility of each one of these witnesses, and cannot find that any one of them signed a card by reason of a representation that the purpose of the card was to secure an election to determine the representation question.

In the category of cases such as the instant one, there can be no doubt that when an employer inquires into an employee's union activities the interrogated employee naturally will fear that the employer not only wants this information concerning the extent of his Union interest and activities, but also may have in mind the use of that information as a basis of some form of reprisal against the employee.

Interrogation as to union as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained. N.L.R.B. v. West Coast Casket Co., 205 F. 2d 902, 904 (C.A. 9). As stated in N.L.R.B. v. Essex Wire Corp. of California, 245 F. 2d 589, 592 (C.A. 9), whether the Company would be disposed to make such use of the /information/ is beside the point. As long as the opportunity is present, employees may have a real fear that this would be done. The legality of an employer poll, it has been held, depends upon the manner in which the poll is conducted and the circumstances surrounding the taking of the poll. Blue Flash Express Co., 109 NLRB 591; Daniel Construction Co. v. N.L.R.B., 341 F. 2d 805, 812-813 (C.A. 4), cert. denied, 382 U.S. 831; N.L.R.B. v. Lexington Chair Co., 361 F. 2d 283, 289-290 (C.A. 4); N.L.R.B. v. McCormick Concrete Co., 371 F. 2d 149, 151 (C.A. 4); N.L.R.B. v. Camco, Inc., 340 F. 2d 803, 805-806 (C.A. 5) cert. denied, 382 U.S. 926.

Here the parties have, in connection with their respective positions, noted Blue Flash Express Co., supra, wherein certain conditions are said to be relevant: (1) Whether the employer has a legitimate interest in conducting the poll, i.e., to ascertain the extent of support for a union claiming to be a majority representative; (2) whether the employer conveys to the employees this legitimate purpose; (3) whether assurances are given employees that no reprisals will be taken against them because of their answers to the poll; (4) the atmosphere in which the poll is taken; (5) the method in polling, the time and place of the questioning, the identity of the interrogator, and (6) the truthfulness of the employees' answers.

In Struksness Construction Co., Inc., 165 NLRB No. 102, the Board set forth uncoercive methods which an employer may adopt to verify a union's majority. In that case the Board wrote:

> We have therefore determined, in the light of all the foregoing considerations, and in accord with the Court's (C.A.D.C.) remand, to adopt the following revision of Blue Flash criteria:
>
> > Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act unless the following safeguards are observed: (1) The purpose of the poll is to determine the truth of a union's claim of a majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practice or otherwise created a coercive atmosphere.

Obviously, the Respondent here has not met the criteria. As was said in N.L.R.B. v. Camco, Inc., supra at page 806, "the Board could reasonably infer that they /the employees/ were answering under pressure."

The poll as conducted by Vice President Darnall and Store Manager Crager, when they called each employee questioned away from his or her work station, and recorded the employee's answer on a pad of paper, acted in a manner which created an "aroma of coercion" condemned by the Act. Joy Silk Mills, Inc. v. N.L.R.B., 185 F. 2d 732, 740 (C.A.D.C.), cert. denied, 341 U.S. 914. 6/ It fairly may be said that the Respondent is not unsophisticated in respect to the difference between proper and improper interrogation.

I find that the poll of employees conducted by the Respondent on January 21 constituted an unfair labor practice within the meaning of Section 8(a)(1) of the Act, and was calculated to impinge upon the rights of employees guaranteed in Section 7 of the Act.

Surveillance

At the hearing, counsel for the General Counsel moved to amend the complaint by including the name of Sue Bess as department head of toys and to allege that the conduct of Bess, on or about June 3, 1967, in informing employees of the Respondent that she had been requested by Store Manager Crager and Assistant Store Manager David to spy on the employees' union activities and to report such back to them in order to discourage Respondent's employees' activities on behalf of the Union, was violative of Section 8(a)(1).

Bess did not testify at the hearing. Crager, in answer to the question as to whether he had ever told Bess that she should spy on the employees' union activities and report any such activities to him, replied "not that I've ever known of"; and when asked if David had ever done this in his hearing, or had instructed her to do this within the hearing of Crager, Crager replied "No, sir. Not that I know of at all." Being pressed by counsel for the Respondent as to whether specifically on January 3 he had told Bess that she should spy on the employees' union activities "and report such activities to you in order to discourage the employees' activities on behalf of the Union" he replied "No, sir. Not that I know of at all." He said that Bess had never reported any union activity to him on the part of employees nor had David ever in his hearing requested any employees or any supervisors to spy on the employees' union activities.

Margie Holley, an employee for about 4 years, testified to a conversation she had with Supervisor Sue Bess in the clothing department of the store some time around January 3 or 4. In answer to a question as to what Bess had told her on that occasion she testified:

> She came downstairs and said Mr. Crager had had her up in his office. And she told me, she said, I'm scared to death. Mr. Crager just had me in the office and told me that if he found out that any of the department heads had signed for the Union that he would fire them and

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6/ The Board has in the past issued five unfair labor practice decisions against Respondent; six other cases have not yet culminated in a Board decision. See, N.L.R.B. v. Heck's Inc., 369 F. 2d 370 (C.A. 6), enforcing 150 NLRB 1565; N.L.R.B. v. Heck's Inc. (No. 11,390, (C.A. 4)), consent decree entered June 13, 1967; N.L.R.B. v. Heck's Inc. (No. 11,062, (C.A. 4)), decision pending before the Court; N.L.R.B. v. Heck's Inc. (No. 11,391, (C.A. 4)), petition for enforcement filed. In three other cases, the Trial Examiners' Decisions have issued findings that Respondent has engaged in still other unfair labor practices and these cases are presently before the Board (Board Case Nos. 9-CA-3556, 3477, and 3728). In three additional cases, the unfair labor practice hearings have been held and the Trial Examiners' Decisions are pending (Board Case Nos. 9-CA-3828, 4147, and 4185, the instant case.

there wouldn't be nothing anybody can do about it. And she asked me if I would tell Mr. Skaggs and have him get in touch with her. And I told her I would. * * * I told her that I'd have Ronnie call her and tell her that, if she thought there was any way she could get in trouble over signing a union card by him claiming she was a department head.

Mrs Holley testified further that on a later date, perhaps about a week before the union representatives had called at the store, Bess " . . . told me he had asked her to watch out and listen for the employees and let him know if she heard them discussing or trying to get anybody to sign up for the Union." On cross-examination, Mrs. Holley said:

Q. (By Mr. Holroyd): * * * Now, would you tell us again exactly what she said in reference to what Mr. Crager had told her?

A. Now, I didn't have that conversation with her about what he told her upstairs, that he could fire anybody, that was at the store, when she came out of his office she told me that. Because she was nervous and scared.

Q. She told you that she wanted to get in touch with Mr. ---.

A. Wanted me to have Mr. Skaggs call her because Mr. Crager had called her up in the office and told her that if he found out that any of the department heads had signed up or anything to do with the Union that he could fire them and there wouldn't be nothing anybody could do about it. And she came right straight downstairs and told me.

* * * *

Q. Would you tell us what she said to you when she discussed the Union with you?

A. That she was afraid to let Mr. Crager know or let on like she had signed a union card because she was afraid they would fire her. And she is the sole support of herself and her little girl.

Q. This wasn't in that conversation when she was nervous and had just gotten through talking?

A. No, not then. That's at another time that we were talking about the Union.

Q. Well, what else did she say about the Union that you recall?

A. That was all, that I told you awhile ago.

As noted, Bess did not appear to testify. The testimony of Crager regarding his alleged instructions to Bess as reported by Mrs. Holley, was equivocal and to my mind unsatisfactory. In these circumstances, I credit the testimony of Mrs. Holley and find that the evidence herein supports the amendment to the complaint.

Concluding Findings

I find that all employees of Respondent's Huntington, West Virginia, Fifth Avenue store, including office clerical employees, but excluding the store manager, assistant store manager, and all guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining. I find that on or about January 16, 1967, and at all times thereafter, the Union has been, and is now, the exclusive collective bargaining representative for the purpose of bargaining with the Respondent as to rates of pay, wages, hours and other terms and conditions of employment of all employees in the unit; that the Union on January 16 orally and January 17 in writing requested the Respondent to recognize and bargain with it as the exclusive bargaining representative of the employees in the described unit; and that since or about January 16, the Respondent has refused and continues to refuse to bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit.

I find that the Company-conducted poll by Darnall in company with Crager, on January 21, constituted unlawful interrogation amounting to interference, coercion and restraint of employees in violation of Section 7 and Section 8(1) of the Act; and that the conduct of Bess in informing Mrs. Holley and inferentially other employees of the Respondent that she, Bess had been requested by Store Manager Crager and Assistant Manager David to spy on the employees' union activities and to report such back to them in order to discourage the Respondent's employees' activities on behalf of the Union constituted unlawful interference, coercion and restraint in violation of Section 8(a)(1) of the Act.

It further is found that the refusal of the Respondent to bargain collectively in good faith with the Union as the representative of the Respondent's employees in an appropriate bargaining unit was and continues to be a violation of Section 8(a)(5) of the Act.

Upon the foregoing findings of fact, I make the following:

Conclusions of Law

1. The Respondent is an employer as defined in Section 2(2) of the Act, engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. All employees of Respondent's Huntington, West Virginia, Fifth Avenue Store, including office clerical employees, but excluding the store manager, assistant store manager, and all guards, professional employees and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material the Union has been and still is the exclusive representative of all the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing since January 16, 1967, to bargain with the Union as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. By interrogation of employees about their union activities, threatening reprisals for such activities, and by taking a poll of its employees for the purpose of determining their interest in and activities on behalf of the Union the Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act and has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of the Respondent described above have a close intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent has violated and is violating Section 8(a)(1) and (5) of the Act, it will be recommended that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent refused to bargain and continues to refuse to bargain in good faith with the Union, which represents a majority of the employees in an appropriate unit, it will be recommended that the Respondent be ordered to bargain, upon request, in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

RECOMMENDED ORDER

Upon the entire record in the case, and the foregoing findings of fact and conclusions of law, it is recommended that the Respondent, Heck's Inc., Huntington, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain concerning rates of pay, wages, hours of employment, or other conditions of employment with Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees in its Huntington, West Virginia, store, including office clerical employees, but excluding the store manager, assistant store manager, and all guards, professional employees and supervisors as defined in the Act, a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

(b) Coercively interrogating employees about their union activities, threatening reprisals for such activities, or engaging in surveillance of the activities of such employees in respect to their interest in or activities on behalf of, or membership in the Union.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named union, or any other labor organization and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the proviso to Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is found necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees of the Respondent in its Huntington, West Virginia, store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its store in Huntington, West Virginia, copies of the notice attached hereto marked Appendix. 7/ Copies of said notice, to be furnished by the Regional Director for the Ninth Region shall, after being duly signed by the Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Ninth Region, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith. 8/

Dated at Washington, D.C.

Arthur E. Reyman
Trial Examiner

7/ In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of the United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

8/ In the event that the Recommended Order is adopted by the Board this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

(AS AMENDED)

we hereby notify our employees that:

WE WILL bargain in good faith, upon request, with FOOD STORE EMPLOYEES UNION, LOCAL NO. 347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below in respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

> All employees at our Huntington, West Virginia, store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act.

WE WILL NOT coercively interrogate our employees about their union activities, threaten reprisals for such activities or create the impression of surveillance thereof.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join or assist FOOD STORE EMPLOYEES UNION, LOCAL NO. 347 AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities

for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all such activities, except to the extent that such right may be affected by the proviso to Section 8(a)(3) of the Act.

HECK'S, INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2407 Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3663).

174 NLRB No. 138

D-1501
Nitro, W. Va.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HECK'S, INC.

and

Case 9-CA-4429

FOOD STORE EMPLOYEES UNION
LOCAL #347, AMALGAMATED
MEAT CUTTERS AND BUTCHER WORKMEN
OF NORTH AMERICA, AFL-CIO

DECISION AND ORDER

On May 29, 1968, Trial Examiner James T. Barker issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. Thereafter, the General Counsel, and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs.[1/]

Pursuant to Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified herein.[2/]

1/ On October 7, 1968, the Charging Party filed a Motion to Reopen Record for Further Hearing. The motion is hereby denied as being without merit.

2/ In the absence of exceptions thereto, we adopt, the findings of the Trial Examiner that the Respondent violated Section 8(a)(1) of the Act by threatening its employees concerning their union activities, by threatening employees with discharge should they execute a union authorization card or otherwise engaged in union activities, by informing employees that a former (Continued)

The General Counsel and the Charging Party filed exceptions to the Trial Examiner's findings that the poll conducted by Respondent on September 7, 1967, was not in violation of Section 8(a)(1) of the Act, that as a result of such poll Respondent had a good-faith doubt of the Union's majority when Respondent declined recognition on September 12, 1967, and that Respondent did not violate Section 8(a)(5). We find merit in these exceptions.

We agree with the Trial Examiner that the criteria set forth in Struksnes Construction Co., Inc.,[3/] are the proper measure for determining the validity of an employer conducted poll and in that decision the Board stated, inter alia, that a poll of employees concerning their support for a union would be lawful only if the employer had not engaged in unfair labor practices.[4/] Here, however, the record clearly establishes, and it was so found by the Trial Examiner, that the Respondent engaged in acts violative of Section 8(a)(1) by illegal interrogation, threats of discharge, and surveillance which were committed by the Respondent during its continuous campaign against organization by the Union prior to September 7, 1967 - the date of the polling.

Contrary to the Trial Examiner we find it irrelevant with respect to the legality of the poll that the unlawful Section 8(a)(1) conduct, which has not been remedied occurred about 3 months prior to the balloting. Consequently, as the safeguards established by the Struksnes decision were not fully complied with, we find that Respondent's polling of its employees on September 7,1967,

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2/ employee who had engaged in union activities had been discharged /for stealing/ and urging an employee to so inform fellow employees, by requesting an employee to inform management concerning the union activities of other employees, and by instructing employees to abstain from contact or association with union representatives. We also find, as did the Trial Examiner, that the Union possessed a majority of valid designations and accordingly possessed authorizations of a majority of the unit employees at the time the Union made its demand for recognition by the Respondent. The Trial Examiner erroneously recapitulated the number of valid union designation cards as 22. However, we find that the Union, at such time, possessed 23 valid cards. We note that the Trial Examiner in the last sentence of the final paragraph on page 5 of his Decision inadvertently referred to Haddad instead of Darnall. His Decision is corrected accordingly.

3/ 165 NLRB No. 102.

4/ In Struksnes we stated the applicable rule to be as follows: Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

violated Section 8(a)(1) of the Act.[5/]

The rule in Struksnes was adopted after due consideration of our past experience and with a view of protecting employees' rights as well as the legitimate interests of the employer under the Act. Accordingly, we determined that the purposes of the Act would be best served by adopting a rule that provides that the polling of employees by an employer is, absent unusual circumstances, violative of Section 8(a)(1) of the Act unless the enumerated safeguards, which are in the conjunctive, have been fully observed by the employer. Thus, where the employer elects to resort to the polling method of ascertaining his employees' union sympathies, such poll is presumed to be violative of the Act and the burden is upon the employer to establish that he has observed all of such required safeguards and thereby lawful. In simple language an employer who resorts to the poll must come to it with clean hands.

We are here faced with the overall record of this Respondent showing continual engagement in impermissible interrogation, surveillance,[6/] discharges, and illegal polls, nearly all of which are unremedied, a record permeated throughout with constant evidence of company antipathy toward the Union together with a single over-all established labor policy that flagrantly opposes the provisions of the Act. As we stated in a recent decision involving the same Respondent:

> "We cannot at this time, overlook a course of conduct engaged in by this Employer on a companywide scale. The Board has, in eight different cases found this Employer has violated the Act. The violations have included polling similar to that in the instant case, threats, interrogation, and discriminatory discharges. The Respondent operates several retail stores, all located in western West Virginia, and nearby Ashland, Kentucky and most, if not all, of these stores have been the site of unlawful conduct. Employees at all stores receive a

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5/ See also, Heck's Inc., 159 NLRB 1151, enfd. 387 F.2d 65 (C.A. 4) wherein the Board and the Court found the Respondent's polling to be unlawful and Heck's, Inc., 171 NLRB No. 112 and Heck's, Inc., 172 NLRB No. 225, all showing that the Respondent's labor relations policy at all its stores is based, in part, upon rejection of the concept of freedom of choice by employees with respect to selection of a collective-bargaining agent.

6/ We would generally find, under circumstances that do not exist here, that a secret ballot was an important factor favoring the legitimacy of an employer's poll, but where an employer has engaged in surveillance efforts, as is the case here, the veil of secrecy becomes meaningless since the vote merely informs the employer as to the degree he must extend his surveillance efforts to root out employees seeking to exercise their rights guaranteed by the Act. Further, in reviewing this Respondent's past history in conducting polls of its employees it is clearly evident that our Blue Flash decision made no impression on Respondent, and we are constrained to believe that Struksnes made no more impression, except possibly to be used as another vehicle by Respondent to gain an illegal objective.

> monthly company publication, which, on occasion, has been utilized to comment upon union organizational developments. President Haddad actively participated in conduct found to be unlawful in five of the cases set forth in footnote 5, although not in the instant case. Vice-president Darnall has engaged in unlawful conduct in five of these cases, and has again engaged in unlawful conduct in the present case." (Citations omitted).
>
> "It is clear that the Respondent has the same labor relations policy affecting all employees at all of its stores, and this policy is based, in part, on opposition to the freedom of choice by its employees in regard to collective bargaining. It is also apparent that the company newsletter, the proximity of the stores, and the active participation of top company officials in carrying out this illegal labor policy, all have the effect of emphasizing individual incidents of unlawful conduct. The repetition of conduct which had earlier been found unlawful at this same store and to many of the same employees further indicates a disregard for the policies of the Act, and the impact of such repeated conduct therefore is much greater than in the initial incident." (Citations omitted). 7/

On the basis of the foregoing, we conclude that, in the circumstances, the Respondent's poll was taken in a coercive atmosphere created by the Respondent, thus failing to meet another standard required by Struksnes.

We find, that as the poll was unlawful it cannot be used to establish the Respondent's good-faith doubt concerning the Union's majority status. Therefore, we find, contrary to the Trial Examiner, that the Respondent's refusal to recognize the Union on September 12 and thereafter was not based on a good-faith doubt of the Union's majority status. Consequently, as the Union represented a majority of the Respondent's employees at times relevant, we further find that the refusal to recognize the union was unlawful within the meaning of Section 8(a)(5) and (1) of the Act.

It having been found that the Respondent refused to bargain and continues to refuse to bargain in good faith with the Union, which represents a majority of the employees in an appropriate unit, it will be ordered that the Respondent recognize and bargain, upon request, in good faith with the Union as the exclusive representative of the employees in the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and orders that

7/ Heck's Inc., 171 NLRB No. 112.

the Respondent, Heck's, Inc., Kanawha City, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified below:

1. Delete paragraph 5 of the Trial Examiner's Conclusions of Law and substitute therefor the following:

5. By refusing since September 12, 1967, to bargain with the Union as the exclusive representative of its employees in an appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

2. Add the following as paragraph 1(c) of the Trial Examiner's Recommended Order:

(c) Refusing to bargain concerning rates of pay, wages, hours of employment, or other conditions of employment with Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees in its Kanawha City, West Virginia, store, including office clerical employees, but excluding the store manager, assistant store manager, and all guards, professional employees and supervisors as defined in the Act, a unit appropriate for collective bargaining within the meaning of Section 9(a) of the Act.

3. Add the following as paragraph 2(a) of the Trial Examiner's Recommended Order and reletter the following paragraphs accordingly:

(a) Upon request, bargain collectively in good faith with Food Store Employees Union, Local #347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all employees of the Respondent in its Kanawha City, West Virginia, store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

4. Amend Notice To All Employees (Appendix) to Trial Examiner's Decision by adding the following paragraph as the first paragraph of such Notice:

> WE WILL recognize and WE WILL bargain in good faith, upon request, with FOOD STORE EMPLOYEES UNION, LOCAL #347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the exclusive representative of all employees in the bargaining unit described below in respect to rates of pay, wages, hours of employment, or other conditions of employment, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:
>
> > All employees at our Kanawha City, West Virginia, store, including office clerks, but excluding guards, professional employees, and supervisors as defined in the Act.
>
> Dated, Washington, D.C.

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

Sam Zagoria, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

Nos. 22,318 and 22,414

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,318

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 22,414

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

HECK'S, INC., Respondent

and

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Intervenor

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On Petition To Review and Application To Enforce an Order of the National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Washington, D. C. · THIEL PRESS · 202 · 393-0625

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AUTHORITIES CITED

CASES:

*Cases or authorities chiefly relied on.

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*Cases or authorities chiefly relied on.

CASES—Continued

*Cases or authorities chiefly relied on.

CASES--Continued

STATUTE:

MISCELLANEOUS:

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*Cases or authorities chiefly relied on.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,318

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 22,414

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

HECK'S, INC., Respondent

and

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Intervenor

---

On Petition To Review and Application To Enforce an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ISSUES PRESENTED FOR REVIEW

The issues presented, as formulated in the prehearing conference stipulation (A. 692-693), are:

Case No. 22,318

Whether the Board's order is sufficiently broad to remedy the violations of the Act.

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by unlawfully questioning and threatening its employees concerning the Union and by polling its employees in a non-secret ballot to determine their support for the Union.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

3. Whether the Board could properly order the Company to bargain with the Union as an appropriate remedy for the Company's 8(a)(1) violations found by the Board.

These cases have never previously been before this Court.

STATEMENT OF THE CASE

No. 22,318 is before the Court upon petition of the Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO ("the Union") to review portions of an order of the National Labor Relations Board issued against Heck's, Inc. ("the Company") on September 24, 1968, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). In No. 22,414, the Board seeks enforcement of the same order. The Board's decision and order are reported at 172 NLRB No. 255.[1] This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act; the Board's jurisdiction is not contested.

[1] "A." references are to the printed Appendix. Occasional "Exh." references are to exhibits omitted from the Appendix and lodged with the Court. References preceding a semicolon are to the Board's findings; those following are to supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company—in resisting the Union's organizational drive at its Clarksburg, West Virginia, store—violated Section 8(a)(1) of the Act by unlawfully questioning and threatening employees concerning the Union and by polling employees in a non-secret ballot to determine their support for the Union. The Board also found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of its employees in an appropriate unit. The evidence upon which the Board based its findings is summarized below.

A. Background: the Company's prior unfair labor practices

The Company operates a chain of 11 retail stores at various locations in West Virginia and Kentucky (A. 754; 402-403, 744). Since 1964, in addition to the instant case, the Company has been the subject of nine unfair labor practice proceedings before the Board in connection with organizational efforts at certain stores.[2] Seven of these cases have either received or are pending court review, including two proceedings (Case Nos. 21,809 and 21,921; and 22,183 and 22,284) now before this Court (*supra*, n. 2). And, although these other proceedings do not involve the Company's Clarksburg store, the Board pertinently stated in the instant case (A. 747):

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[2]See, 150 NLRB 1565 (1965), enforced *per curiam*, 369 F.2d 370 (C.A. 6, 1966); 156 NLRB 760 (1966), enforced as modified, 386 F.2d 317 (C.A. 4, 1967); 158 NLRB 121 (1966) and 159 NLRB 1151 (1966), enforced *per curiam*, 387 F.2d 65 (C.A. 4, 1967); 159 NLRB 1331 (1966), consent decree entered (C.A. 4, No. 11,390, June 13, 1967); 166 NLRB Nos. 32 and 38 (1967), enforced as modified, 390 F.2d 655 (C.A. 4, 1968), certiorari granted, 37 U.S. L.W. 3219 (1968); 170 NLRB No. 53 (1968) (pending before this Court, Nos. 21,809 and 21,921); 171 NLRB No. 112 (pending before this Court, Nos. 22,183 and 22,284).

> . . . . Respondent [has] engaged in a pattern of similar unfair labor practices at its other stores in West Virginia and Kentucky, [3] and * * * has a labor policy in all of its stores that is opposed to the policies of the Act. Earlier Board decisions involving Respondent's operations show that President Haddad and Vice President Darnall, who together control the labor policy at all the . . . stores, have both actively participated at a number of stores in conduct found to be unlawful . . . [and] have repeated their unlawful conduct in the present cases.

We summarize below the Company's conduct found unlawful in this case.

B. The Union obtains authorization cards from a majority of the Company's Clarksburg employees and requests recognition; the Company insists upon an election

The Union began its organizational campaign at the Company's Clarksburg store during the first week in May of 1967[4] (A. 754; 21). By May 20, the Union had secured authorization cards from 19 of the 33 employees at the store, and that same day sent the Company a telegram asking for "recognition in bargaining" for the store employees. The Union offered in the telegram "to deliver [the] authorization cards" to the Company so as "to dispel any good faith doubt as to . . . [its] majority" (A. 759; 706, 707, G.C. Exhs. 7(a) through 7(s)). On May 25, however, the Company replied in a letter signed by its attorney, Frederick Holroyd, that it would not recognize the Union. The letter explained that a "majority of the employees have advised the Company that they did not desire [the] Union to represent them," and that, consequently, "[i]n an effort

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[3] I.e., coercive interrogations, threats of reprisals for engaging in union activities, creating the impression of surveillance, layoffs and discharges for discriminatory reasons, and refusals to bargain, in violation of Section 8(a)(1), (3) and (5) of the Act (*supra*, n. 2).

[4] All dates are in 1967.

to attempt to resolve the conflict between [the Union's] claim and the doubt raised by the employees as to [its] majority status," the Company "this date petitioned" the Board to hold a representation election (A. 761, 708).

Four days later, the Company filed a petition for an election (A. 761; 703). Thereafter, on June 13, the Union repeated its request for recognition when its representatives met with Company Attorney Holroyd and other Company officials at a Board hearing involving a different dispute between the same parties. On the date of the second request, the Union had in its possession authorization cards signed by 23 of the 38 employees then working at the store, and it offered to show these cards to the Company as proof of its majority status. The Company, however, refused to look at the authorization cards, and again declined to recognize the Union (A. 759, 761; 32-35, 235, 237, 331-332, 729-733, 743, G.C. Exhs. 7(a) through 7(s)).[5] On June 19, the Company and the Union agreed to a consent election to be held on July 13 (A. 754; 253, 704, 705).

C. The Company resists the unionization drive

In early May, shortly after the organizational drive had begun, the Company posted a notice at the store expressing its opposition to the Union. The employees were advised that although the Union would make "wild promises" of higher wages and benefits and "exert tremendous pressure" on employees to obtain their votes, the Company was paying the highest wages possible, the Union would not make it pay more, and the Union would bring instead "long strikes, high dues, fees, fines and assess-

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[5]The Union had obtained 5 new cards between May 20 and June 13, but 1 of the original 19 employees, Paul Goff (A. 712), had left the Company by June 13 (A. 759, n. 8).

ments. . . ." (A. 755; 110, 149-151, 716). The notice cited the economic distress of employees at another company who assertedly had "lost their homes, cars, . . . furniture . . . [and] their jobs" as the result of a strike. Employees were apprised that "if the Union gets over 50% of the employees to sign a union card it doesn't need an election but can demand the right to deal with your company in your place without an election. *So what you are really doing when you sign a union card is voting for the Union.*" The notice also made clear that management "will . . . know who signed" authorization cards because "*the Union must show the cards to the Company*" (A. 755, 716).

About a week or two later, Company Vice-President Ray Darnall conducted a poll of the employees at the store. Each employee was approached individually and handed a slip of paper reading as follows:

> I am sure that you are aware that the Food Store Employees Union are trying to organize this store. I would like to ask you if you want the Union to represent you. You do not have to answer if you do not want to. This will have no bearing on your job.
>
> Name . . . . . .
>
> Yes ( ) No ( ) No Comment ( )
>
> Please sign and check one. Thanks.

Except for three employees who were not polled, each employee signed and marked this "ballot" in Darnall's presence and returned it to him. A count of the "ballots" showed that 11 employees had voted for the Union, 13 had voted against it, and 6 had checked the "no comment" column (A. 755; 90-91, 107-108, 151-152, 158-159, 186-187, 351, 400-401, 706, R. Exhs. 2(a) through (dd)).

Sometime in June, Company President Fred Haddad visited the store. There, he spoke to two cashiers, Marsha Mason and Pamela Jeffers, who

were alone at their registers, and asked them "If [they] knew why Montgomery-Ward's had [gone] out of business." After the employees expressed their opinions on the matter,[6] Haddad informed them that they were incorrect, that Montgomery-Ward's had been closed "because the Union was trying to get in," and "that he [Haddad] didn't blame them . . ., [and] would do the same thing if the Union tried to get into his store." Before leaving, Haddad warned the two employees that he was going to transfer them to another store because they had been "bad girls" (A. 755; 63-65, 147-148).

Later, both Mason and Jeffers were separately admonished by Bill Pulice, the head of the jewelry and sporting goods department, that "Haddad would definitely close the store down if any Union came in. . . ." (A. 754, 757; 65-66, 147-148). And shortly before the election, Pulice walked into employee Sharon Kimble's office exclaiming, "I hate this thing." When Kimble asked him "what he was talking about," Pulice explained that he was troubled by "the Union men being around and everything." Pulice then told Kimble that "Mr. Haddad will close the store down before he will let a Union come in" (A. 754, 91).

Head Cashier Frances Jones questioned employee Robin Webb at work whether she had signed an authorization card. Webb acknowledged that she had, and Jones subsequently asked the employee on a number of occasions if there had been a union meeting and if she had attended. Jones also informed Webb that "the Montgomery-Ward store had closed . . . because the Union was coming in . . . [and Ward's] couldn't afford to pay

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[6]Mason answered that Ward's had been closed "because . . . Heck's and Hill's Department stores had run them out of business" (A. 64). Jeffers stated that Ward's store had been condemned by the fire department (A. 147).

higher wages." Jones warned that the same thing would happen at Heck's; "Mr. Haddad would close the store because he couldn't afford to pay more than a dollar 40 an hour" (A. 754, 43-44).

Jones had several similar conversations with two other employees, Mary Johnson and Beverly Davis. From the end of May until the election on July 13, Jones repeatedly asked these employees whether the Union had held a meeting the previous evening and "how it went." Johnson and Davis were also warned that ". . . if the Union came in, Mr. Haddad would close the store" (A. 754; 157, 159-160, 185-186). Finally, in June or July, Ella Morris, the supervisor in charge of the cosmetics department, initiated a conversation about the Union with employee Cynthia Marsh and then asked Marsh how she would vote in the election. Marsh replied that she did not know "which way [she] was going to vote" (A. 755, 758; 255-256).

D. The Union loses the election; Company counsel conducts post-election interviews

The election was held as scheduled on July 13, and the Union lost by a vote of 16 to 19 with 1 ballot challenged.[7] Thereafter, the Union filed timely objections to conduct affecting the results of the election, as well as unfair labor practice charges alleging that the Company's conduct violated Section 8(a)(1) and (5) of the Act. The two proceedings were consolidated before the Board (A. 753-754, 697-702).

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[7]Company Vice-President Darnall immediately dispatched a telegram to each of the other stores in the Heck's chain, advising them that the Union had lost the election "by an overwhelming majority" and directing them to post the telegram on their bulletin boards. A similar telegram was sent from the Company's Kanawha City store to the Clarksburg store following a poll of the Kanawha City employees which Darnall conducted (A. 756, n. 5; 275-282, 312-316, 741).

About two weeks after the election, Company Counsel Holroyd, in the presence of Vice-President Darnall, interviewed a number of employees, individually, in the store manager's office. Holroyd told the employees that he was seeking information concerning the charges and objections filed by the Union with the Board, and then proceeded to interrogate them using questions which were prepared in advance for the interviews and mimeographed in the form of an affidavit. The statement read as follows:

* * *

I, _____, being duly sworn state under oath as follows:

I am an employee of Heck's in Clarksburg, West Virginia. I was working for Heck's on the date of the N.L.R.B. election held July 13, 1967. I voted in that election. Concerning Heck's campaign in that election I state as follows:

1. In June, 1967, a supervisor of Heck's (did) (did not) tell me that the meat cutters union put Montgomery Ward out of business in Clarksburg.

2. In June, 1967, a supervisor of Heck's (did) (did not) tell me that Heck's would close before it would let a union come in.

3. In June, 1967, a supervisor of Heck's (did) (did not) question me about attendance at a union meeting.

4. In July, 1967, a supervisor of Heck's (did) (did not) ask me how I would vote in the election.

5. In June, 1967, the working rules (were) (were not) changed in my department.

* * *

Holroyd noted the employees' answers in the appropriate place provided in the statement, and at the end of each interview asked the employee to swear to and sign the completed statement. The employees were given no assurances against reprisals based on their answers, and several of them refused to sign; at least one employee was so nervous during her interview

so as to give incorrect statements in response to Holroyd's inquiries (A. 756, 758-759; 46-47, 67-68, 92-95, 148-149, 160-161, 175-176, 187-188, 721).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that the Company violated Section 8(a)(1) of the Act by polling its employees in a coercive manner; by threatening its employees that the store would be closed if they selected the Union as their bargaining representative; and by interrogating its employees as to their Union activities. The Board also found that the Company's conduct between the filing of the petition and the holding of the election constituted interference, and set the election aside. Moreover, reversing the Trial Examiner, the Board found that the Company's refusals to grant the Union's requests for recognition and bargaining were not motivated by a good faith doubt as to the Union's majority status and that such refusals were therefore violative of Section 8(a)(5) and (1) of the Act (A. 745-748).

The Board's order (A. 748-750) requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with the rights guaranteed to employees under Section 7 of the Act. Affirmatively, the Company is required to bargain collectively with the Union upon request, and to post the customary notice at each of its retail stores.[8]

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[8]The Board, noting the exceptions to the Examiner's "failure to find other alleged violations of Section 8(a)(1)," deemed it "unnecessary to pass upon these allegations as such conduct would, in any event, be cumulative, and would not enlarge the scope of [the] order" (A. 746, n. 3).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY UNLAWFULLY QUESTIONING AND THREATENING ITS EMPLOYEES CONCERNING THE UNION AND BY POLLING ITS EMPLOYEES IN A NON-SECRET BALLOT TO DETERMINE THEIR SUPPORT FOR THE UNION

The Company, as shown *supra*, pp. 3-4, has persistently resisted unionization efforts at its stores by resorting to, *inter alia*, conduct proscribed by Section 8(a)(1) of the Act. In this case, the Company, in opposing the Union's organizational drive at its Clarksburg store, again threatened, coerced and restrained employees in the exercise of rights guaranteed them in Section 7 of the Act.

As the credited testimony shows (*supra*, pp. 4-6), the Company conducted a poll into the union sympathies of its Clarksburg employees in disregard of the long-recognized need to neutralize the coercive tendency inherent in such employer inquiries.[9] Thus, after being presented with the Union's demand for bargaining, management first posted a notice making plain to those employees not already aware of its anti-union efforts at other stores that the Company was strongly opposed to union representation. In this atmosphere, several days after the notice was posted, Company Vice President Darnall personally conducted an open poll as to the Union sentiments of the employees. Although the "ballot" which the em-

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[9]As Professor Bok has noted: "By indicating through his questions that he desires to learn about the sympathies and activities of individual employees, the employer may convey an impression, rightly or wrongly, that he is considering reprisals against union supporters. In this way, he may discourage particular employees from giving overt support to the Union . . . ." *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 106 (1964). And see cases cited *infra*, p. 14.

ployees were requested by him to sign did state that the answers given would not affect the employees' jobs. Darnall gave the employees no such reassurances. Moreover, Darnall never told the employees the precise reason the poll was being taken, and the Company's refusal to examine the Union's authorization cards—as well as its history of opposition to the Act—show that the Company was not taking the poll to determine the propriety of recognizing the Union without an election. See, *infra*, p. 21. Under such circumstances, as stated by the Trial Examiner, the Company's poll was "palpably illegal" (A. 758). See, *Madison Brass Works, Inc. v. N.L.R.B.*, 381 F.2d 854, 857 (C.A. 7, 1967); *N.L.R.B. v. Protein Blenders, Inc.*, 215 F.2d 749, 750 (C.A. 8, 1954); *Heck's Inc.*, 159 NLRB 1151, 1156-1157 (1966), enforced, 387 F.2d 65, 66 (C.A. 4, 1967) (in which another poll, similar to the one in the present case, was found unlawful). See also, *Int'l Union of Operating Eng., Local 49, AFL-CIO v. N.L.R.B. (Struksnes Constr. Co.)*, 122 App. D.C. 314, 316-318, 353 F.2d 852, 854-856 (1965).

At the unfair labor practice hearing, the Company sought to defend the poll on the ground that it was taken before the Board's supplemental decision on remand in *Struksnes Constr. Co.*, 165 NLRB No. 102, 65 LRRM 1385 (1967), and was lawful under the test stated in *Blue Flash Express*, 109 NLRB 591 (1954) (A. 282). It is evident that the poll here would have been unlawful under well established Board criteria enunciated prior to *Struksnes*. As the Board's supplemental decision in *Struksnes* makes clear, *Struksnes* simply codified Board rules concerning polling, adding the requirement that the poll taken must be by secret ballot. In *Blue Flash*, the Board held that while an employer's poll of his employees was not *per se* unlawful, its coercive tendency is such that it must be

"conducted under proper safeguards." (*Id.*, 109 NLRB at 593). As stated in *Struksnes*, "the Board found the poll in *Blue Flash* lawful on the ground that (1) the employer's sole purpose was to ascertain whether the union demanding recognition actually represented a majority of the employees, (2) the employees were so informed, (3) assurances against reprisal were given, and (4) the questioning occurred in a background free from employer hostility to union organization" (*Id.*, 65 LRRM at 1386). Surely, the Company's poll here did not come close to meeting these "safeguards."

The Company's other pre-election conduct—interrogations and threats—were equally violative. Thus, as shown in the *Statement* (*supra*, pp. 7-8), Head Cashier Jones frequently asked employees Webb, Johnson, and Davis questions such as whether a union meeting had been held, whether they had attended, and what had happened at the meeting. Jones also asked Webb if she had signed an authorization card, and employee Marsh was questioned by supervisor Morris as to how she would vote in the upcoming election. The Company, of course, had no legitimate reason for this interrogation for it did not intend to use any of the information obtained either to determine the Union's representative status or to prepare for future litigation. Moreover, neither Jones nor Morris made any attempt to explain the purpose of the questioning, and no assurances were given to the questioned employees that reprisals would not be taken. Instead, the employees were left "to conjure up various images of employer retaliation." *Dubin-Haskell Lining Corp. v. N.L.R.B.*, 375 F.2d 568, 571 (C.A. 4, 1967). Accord: *N.L.R.B. v. Camco, Inc.*, 340 F.2d 803, 805 n. 6, 807 (C.A. 5, 1965), cert. den., 382 U.S. 926.

The coercive effect of this questioning was heightened by the fact that it was invariably accompanied by direct threats. Webb, Johnson and Davis were all told by Jones that the store would be closed by Company President Haddad if the Union succeeded in winning the election, and this identical threat was communicated to three more employees–Mason, Kimble and Jeffers–by Department Head Pulice. When President Haddad visited the store prior to the election, he personally repeated the threat to close the store to Mason and Jeffers, and also threatened that he was going to transfer them to another store because they had been "bad girls." The Company's claim that Haddad was "simply kidding" with the employees was properly rejected by the Trial Examiner (A. 757; 522). See *A. P. Green Fire Brick Co. v. N.L.R.B.*, 326 F.2d 910, 914 (C.A. 8, 1964). In short, this record clearly demonstrates that the Company by its pre-election threats, interrogation, polling and prying into the organizational affairs of its employees, violated Section 8(a)(1) of the Act. (Interrogation: *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941); *Amalgamated Clothing Workers (Hamburg Shirt Corp.) v. N.L.R.B.*, 125 App. D.C. 275, 277-278, 371 F.2d 740, 742-743 (1966); *Overnite Transportation Co. v. N.L.R.B.*, 124 App. D.C. 289, 364 F.2d 682, 683-684 (1966); *N.L.R.B. v. Firedoor Corp.*, 291 F.2d 328, 331 (C.A. 2, 1961), cert. denied, 368 U.S. 921. Threats: *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274 n. 20 (1965); *American Bakery and Confection Workers Local 245 (Guy's Food) v. N.L.R.B.*, 126 App. D.C. 383, 384, 379 F.2d 160, 161 (1967); *N.L.R.B. v. Hortex Mfg. Co.*, 120 App. D.C. 47, 343 F.2d 329, 330 (1965); *General Teamsters, etc., Local 782 (Blue Cab Co.) v. N.L.R.B.*, 126 App. D.C. 1, 373 F.2d 661, 663 (1967), cert. denied, 389 U.S. 837.)

Finally, about two weeks after the election, Company Counsel interviewed a number of employees for the stated purpose of preparing his defense to the charges and objections filed by the Union. Although a respondent employer has the privilege of interviewing employees for the purpose of preparing for litigation, the privilege is a narrow one and must be carried out under non-coercive circumstances. Here, the interviews were involuntary; they were carried out in the store manager's office with Vice President Darnall present; the employees were not assured against reprisals; and they were asked to swear to their answers on a printed form entitled "affidavit." Some employees, obviously intimidated, refused to sign this "affidavit." Indeed, one employee was made so "nervous" by Company Counsel's inquiries that she gave him incorrect statements. (*Supra*, pp. 9-10). Under the circumstances, the Trial Examiner properly found that these interviews "exceeded legitimate bounds" and were, consequently, coercive. See, *International Union, UAW v. N.L.R.B. (Preston Products Co.)*, ___ U.S. App. D.C. ___, ___, 392 F.2d 801, 809 (1967), cert. denied, 392 U.S. 906; *Surprenant Mfg. Co. v. N.L.R.B.*, 341 F.2d 756, 762-763 (C.A. 6, 1965).[10]

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[10]Although conflicting testimony existed with respect to some conversations between employees and management representatives, the Trial Examiner's credibility determinations, affirmed by the Board, are based upon demeanor and a careful analysis of the evidence (A. 756-759). It is settled law that such determinations are peculiarly within the province of the Board and its Trial Examiners and should not be overturned on review. *N.L.R.B. v. Walton Mfg. Corp.*, 369 U.S. 404, 407-408 (1962); *Joy Silk Mills v. N.L.R.B.*, 87 App. D.C. 360, 369, 185 F.2d 732, 741 (1950), cert. denied, 341 U.S. 914. *Amalgamated Clothing Workers of America v. N.L.R.B. (Sagamore Shirt Co.)*, 124 App. D.C. 365, 377, 365 F.2d 898, 910 (1966).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

Section 8(a)(5) of the Act requires an employer "to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." That section provides that "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of all the employees in such unit * * *." Although under Section 9(c)(1) the Board conducts elections to determine representative status, such status may be shown by other means. *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72 (1956). Thus, when a majority of employees in an appropriate unit sign union authorization cards, an employer violates Section 8(a)(5) if he insists on an election and refuses to recognize and bargain with the union, where such refusal is not motivated by good faith doubt of the union's majority status. See, e.g., *International Union, U.A.W. v. N.L.R.B. (Preston Products Company, Inc.), supra*, 392 F.2d at 808, cert. denied, 392 U.S. 906; *Amalgamated Clothing Workers v. N.L.R.B. (Sagamore Shirt Co.)*, 124 App. D.C. 365, 373, 365 F.2d 898, 906 (1966); *Joy Silk Mills v. N.L.R.B.*, 87 App. D.C. 360, 369, 185 F.2d 732, 741 (1950), cert. denied, 341 U.S. 914; *N.L.R.B. v. Cumberland Shoe Corp.*, 351 F.2d 917, 920-921 (C.A. 6, 1965).[11]

[11] On December 16, 1968, the Supreme Court granted the Board's petition for certiorari in three companion Fourth Circuit decisions (*N.L.R.B. v. Gissel Packing Company, Inc., et al.*, 398 F.2d 336; *N.L.R.B. v. Heck's, Inc.*, 398 F.2d 337; *N.L.R.B. v. General Steel Products, Inc., and Crown Flex of North Carolina, Inc.*, 398 F.2d 339). The question presented is as follows: "Whether the Court of Appeals for the Fourth Circuit has erroneously construed the provision in Section 8(a)(5) of the National Labor Relations Act, which requires an employer to bargain collectively with the representative of a majority of his employees, by its rule that, irrespective of his other unfair labor practices, an employer is justified in refusing to recognize a union that

We show below that the Union represented a majority of employees in an appropriate unit and the Company's refusal to bargain was not motivated by a good faith doubt of the Union's majority, but instead by a desire to gain time in which to undermine the majority.

A. The Union Had Majority Status in an Appropriate Unit

In the consent election agreement executed by the Company and the Union, and approved by the Board's Regional Director, it was stipulated that "all employees of the Clarksburg store, excluding supervisors, guards, and professional employees," constituted a unit appropriate for collective bargaining purposes. The Board later affirmed the propriety of this agreed-upon unit (A. 746, n. 1; 759, n. 7, 704-705). Moreover, it is undisputed that at the time of the Union's first request for bargaining, on May 20, it possessed authorization cards from 19 employees out of a total unit complement of 33, and that on June 13, when it made its second demand, it possessed the cards of 23 out of 38 employees then in the unit. The Union thus possessed authorization card majorities at the time of both demands. The cards are clear authorizations for union representation,[12]

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bases its claim to representative status solely on the possession of authorization cards signed by a majority of the employees." (No. 573, ___ U.S. ___, 37 LRRM 3219). And see, *Amalgamated Clothing Workers v. N.L.R.B. (Henry I. Siegal Co., Inc.)*, ___ App. D.C. ___, ___ F.2d ___, 70 LRRM 2207 (Case Nos. 21,086, 21,131 and 21,311), petition for rehearing *en banc* pending.

[12]The cards read in pertinent part as follows (G.C. Exhs. 7(c) through (s), A. 729-733):

"APPLICATION

FOOD STORE EMPLOYEES UNION, LOCAL #347
P. O. Box 2751
Charleston, W. Va. – 25330

The undersigned hereby authorizes this Union to represent his or her interest in collective bargaining concerning wages, hours, and working conditions."

and there is no contention made here that the Union misrepresented the purpose of these cards to solicited employees. In fact, the Company posted a notice at the outset of the campaign which made clear to the unit personnel (A. 716):

> . . . if the Union gets over 50% of the employees to sign a union card, it doesn't need an election but can demand the right to deal with your Company . . . without an election. *So what you are really doing when you sign a union card is voting for the Union.*

The Company contends, however, that four of the cards solicited were obtained through coercion and were therefore invalid.[13] At the unfair labor practice hearing, the Company presented two employee witnesses, Alice Neely and Avis Wetzel, who testified that they signed authorization cards for the Union after being told by the union solicitors that they would lose their jobs if they refused (A. 760-761; 478, 479, 444-445). The challenge to a third card, Evelyn Carpenter's, is based on the fact that Carpenter was present with Neely and also signed a card when the alleged threat was made (A. 760; 477-478). Carpenter, however, did not testify and the Trial Examiner discredited the testimony of Neely and Wetzel that they were threatened. The Examiner found instead that Neely and Wetzel were only told by the union solicitors that "if and when the Union came in . . ., in most contracts [it had] union shop agreements, and after a certain period of time they would have to belong to the Union" (A. 760-761; 632, 666).[14] This statement was neither a threat

[13] In order to destroy the Union's majority at the time of its second demand, the Company, of course, would have to show that all four cards challenged were invalid.

[14] The Examiner's ruling discrediting the testimony of Neely and Wetzel was clearly within his discretion. See, *supra*, p. 15, n. 10. Neely's story as to the events surrounding the signing of her card was, to say the least, rather extraordinary. She testified that prior to signing a card, she and a fellow employee, Evelyn Carpenter,

nor a misrepresentation, and provides no reason for invalidating the cards. The fourth card which the Company seeks to invalidate belonged to Ursel Strosnider who signed after receiving a telephone call from Wetzel in which Wetzel told her: "I signed. I don't know what you are going to do. If you want to sign, that's up to you. I suppose I might as well lose my job one way as well as another" (A. 761; 460). This statement, which reflects no fear of union retaliation, furnishes no reason for the elimina-

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had been followed on several nights as they drove home from work by a car containing the Union's organizers. On one occasion, according to Neely, they threw a rock at her car (A. 760; 473-476). However, in spite of her testimony as to this experience, Neely stated that on May 18, after work, she and Carpenter voluntarily met with two union organizers, Ronald Skaggs and Carl Lambert, at a nearby restaurant, so that they could sign authorization cards "if they [the Union] had anything to offer us . . . ." During the ensuing conversation which lasted over an hour, Neely asked a number of questions dealing with possible union benefits such as retirement and insurance. (A. 760; 499-500, 490). And it was during this conversation that Neely was allegedly told that "if [she] didn't sign the card [she] could lose her job with the Company (A. 760; 478, 479). Nevertheless, Neely admitted that after signing the card she attended a Union meeting, and also "voted" for the Union in Darnall's poll (A. 760; 491-494). Plainly, the Examiner was not obligated to accept Neely's unsupported version of events, and could instead credit the testimony of both Skaggs and Lambert that they neither followed nor threw anything at Neely's car, and that they never threatened Neely that she could lose her job if she did not sign an authorization card (A. 760-761; 630-632, 662-663).

Similarly, employee Wetzel testified that she signed a card for the Union after being told by Skaggs and Lambert that "the Union is going in . . . and when it gets in [she would] have to join the Union to keep [her] job" (A. 761; 444-445). The conversation (after which Wetzel's card was solicited) lasted at least an hour and a half, and during this time the Union organizers explained to her the possible benefits she would receive if she joined the Union. (A. 761; 449, 458). After signing the card, Wetzel attended a number of union meetings and spoke in favor of the Union. (A. 761; 466, 682-683). She also indicated her support for the Union in Darnall's poll (A. 761; 470). In view of Wetzel's favorable attitude toward the Union after she signed the card, the Examiner could properly find that Wetzel was not coerced into signing the card, and that she was only told by Skaggs and Lambert (as they testified) that the Union would seek a union shop clause if it became the employee bargaining representative and that Wetzel would then be required to comply. (A. 632, 666).

tion of Strosnider's card. Thus, the four cards challenged by the Company were, in fact, valid, and the Union was therefore the majority representative of the employees at the Clarksburg store when it demanded recognition and bargaining.

B. The Company's Refusal To Recognize the Union Was Not Motivated by a Good Faith Doubt of the Union's Majority Status

The Board found, contrary to the Trial Examiner, that the Company's repeated refusal to recognize the Union was not based on a good faith doubt of the Union's majority status, but was "for the purpose of utilizing the pre-election period to undermine the Union's majority . . ." (A. 749).[15] The record amply supports this determination.

Thus, the Company avoided the Union's repeated offers to allow it to inspect the authorization cards in the Union's possession, and, as a result of this apparent disinterest, had no knowledge of the strength of the Union's card majority. As in *N.L.R.B. v. The Sinclair Co.*, 397 F.2d 157, 161 (C.A. 1, 1968), cert. granted, 37 L.W. 3219 (1969), "the Company made no attempt to discover what the actual card situation was . . ." Instead, the Company replied to the Union's May 20 demand stating only: "A majority of the employees have advised the company that they did not desire [the] union to represent them." This was admittedly a reference to the poll taken by Company Vice President Darnall (A. 348-349). As was shown above, however, this poll was "palpably illegal": it was an open

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[15] Although the Board reversed the Examiner, the disagreement related solely to the proper inference to be drawn from the record and the interpretation of the law. In such cases, "the presumptively broader gauge and experience of members of the Board have a meaningful role." *Oil, Chemical & Atomic Workers Int'l Union Local 4-243 v. N.L.R.B.*, 124 App. D.C. 113, 116, 362 F.2d 943, 946 (1966).

vote taken shortly after the Company had revealed its hostility to the Union and without any verbal reassurances to the employees against reprisals. Although the Union received only 11 votes to the Company's 13, six employees refused to state their preference, and three employees were not even polled. Under these circumstances, the poll taken by the Company was meaningless, and the Company cannot use its own patently unlawful conduct to establish "good faith." *Madison Brass Works v. N.L.R.B., supra*, 381 F.2d at 857.

In fact, at the unfair labor practice hearing, the Company did not seek to rely upon the poll as a basis for rejecting the Union's demand for bargaining. Rather, Vice President Darnall testified that he and Company President Haddad reached a decision not to bargain because of "past experience with the Union" which had demonstrated on other occasions that the Union had asked for bargaining without a valid card majority (A. 286-287, 346-348). The Company, however, had never agreed—even at the outset—to a Union demand for bargaining based on cards (A. 301). In view of this fact and the Company's later conduct, the Board properly rejected the claim that the Union's prior failure to establish a majority entered into the Company's "policy" (A. 301) of refraining from recognizing union card majorities—a "policy" first disclosed by the Company at the unfair labor practice hearing.

In addition to the fact that there was no real basis for the Company's doubt here, it engaged—as it had in the past in other anti-union campaigns—in serious illegal conduct calculated to deprive the Union of its support. As shown above, almost as soon as the Company became aware of the Union's activity at its Clarksburg store, it conducted a patently illegal poll of the employees at the store, in spite of the fact, as previously noted (*supra*,

p. 12), that a similar poll had already been declared unlawful. It is evident that the Company did not take the poll for the purpose of deciding whether or not to recognize the Union; instead, the poll was a device for further interfering with the organizational rights of its employees. Similarly, the Company's threats and interrogation in this case were the same type of violations which the Board had previously found the Company to be guilty of in earlier cases (*supra*, n. 2). Such flagrant repetition of conduct previously found to be unlawful indicates a total disregard for the policies of the Act and bears directly on the good faith doubt of the Company's other actions. And this is especially true in the circumstances of the present case, where both President Haddad and Vice President Darnall, who were responsible for the decision not to recognize the Union (A. 285), were also responsible for substantial unlawful conduct in this case as well as in prior cases. See, A. 747.

Further, in assessing the Company's motivation for refusing to bargain, it was permissible for the Board to consider, as it did. the unlawful conduct engaged in by this employer on a companywide scale.[16] In this connection, the Board observed that it had "recently found that [the Company] engaged in a pattern of similar unfair labor practices at its other stores in West Virginia and Kentucky, and that [the Company] has a labor policy in all its stores that is opposed to the policies of the Act." (A. 747). The Board then quoted from an earlier *Heck's* decision, 171 NLRB No. 112 (pending review in this Court, Nos. 22,183-22,284), where it stated that:

[16]See, *N.L.R.B. v. Overnite Transp. Co.*, 308 F.2d 284, 286 (C.A. 4, 1962); *N.L.R.B. v. Ford*, 170 F.2d 735, 739 (C.A. 6, 1948). While past unlawful conduct is not of itself sufficient to justify a finding of bad faith, "the Board may view and consider the background of the parties and their past conduct as it relates to their management-employee practices" in making findings on this issue. *N.L.R.B. v. Southern Transport, Inc.*, 355 F.2d 978, 981 (C.A. 8, 1966).

> It is clear that the Respondent has the same labor relations policy affecting all employees at all of its stores, [footnote omitted] and this policy is based, in part, on opposition to the freedom of choice by its employees in regard to collective bargaining. It is also apparent that . . . the proximity of the stores, and the active participation of top company officials in carrying out this illegal labor policy, all have the effect of emphasizing individual incidents of unlawful conduct.

As shown by the foregoing, the Company's "refusal to grant recognition, followed by its extensive violations of the Act and its interference with the employees' free choice in the Board conducted election, clearly evidence its unlawful motive and justify an inference of bad faith." (A. 748). The Company "has transgressed the bounds of permissible conduct to a sufficient extent to permit the Board to conclude that its refusal to bargain was as ill-intentioned as its other actions." *Joy Silk Mills v. N.L.R.B., supra*, 87 App. D.C. at 370, 185 F.2d at 742.[17]

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[17] Based on the Company's unlawful pre-election conduct, the Board sustained the Union's objections to the election and set it aside (A. 746, n. 1). The Board, in issuing a bargaining order after the Union had participated in an invalid election, followed a policy first announced in *M. H. Davidson Co.*, 94 NLRB 142 (1951), and readopted in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964). The Courts have upheld the Board's power to issue a bargaining order under such circumstances, both originally and since the policy has been readopted. See, e.g., *International Union, UAW v. N.L.R.B. (Preston Products Co.), supra; International Union of Electrical Workers v. N.L.R.B. (S.N.C. Mfg. Co.)*, 122 App. D.C. 145, 352 F.2d 361 (1965) cert. denied, 382 U.S. 902; *Amalgamated Clothing Workers v. N.L.R.B. (Edro Corp.)*, 345 F.2d 264 (C.A. 2, 1965). See also, *Joy Silk Mills v. N.L.R.B., supra.*

III. THE BOARD COULD PROPERLY ORDER THE COMPANY TO BARGAIN WITH THE UNION AS AN APPROPRIATE REMEDY FOR THE COMPANY'S 8(a)(1) VIOLATIONS

A bargaining order is, of course, an appropriate remedy for the Company's refusal to recognize the majority representative of the employees in violation of Section 8(a)(5) of the Act. Alternatively, in view of the Company's extensive violations of Section 8(a)(1) of the Act, the Board's bargaining order is a reasonable and effective remedy for the unfair labor practices found and one which falls well within the Board's statutory powers (A. 748).

Section 10(c) of the Act authorizes the Board, on finding an unfair labor practice, to require an employer "to take such affirmative action * * * as will effectuate the policies of the Act." The power to design remedies thus entrusted to the Board by Congress is, as the Supreme Court has pointed out, a "broad discretionary one" (*N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953)), subject to "limited judicial review." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). An order of the Board may not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943); *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 215-217 (1964).

Here, the Union possessed 23 valid authorization cards on the date of its last demand to the Company on June 13. Two days later the Union secured two additional cards giving it a total of 25 valid authorizations in

a unit of 38 employees (A. 733-734).[18] Thus, prior to the election the Union enjoyed the support of about two-thirds of the employees at the store. Even if the refusal to bargain by the Company was in good faith—and hence not a violation of Section 8(a)(5) of the Act—the widespread polling, threats, and coercive interrogation made a fair election impossible. The consequent frustration of the employees' choice of bargaining representative was the direct result of conduct for which the Company must be held accountable. It was thus not unreasonable for the Board to order the Company to bargain in this case, for among the purposes which the Board may attempt to accomplish in framing an appropriate remedy for unfair labor practices is a "restoration of the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practices (*Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941)) and to prevent the employer from profiting by his own unlawful conduct (*Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702, 704 (1944)). Indeed, enforcement of the bargaining order "may well be the only way to remedy the illegal course of conduct deliberately chosen by [the Company]." *Thrift Drug Co. v. N.L.R.B.*, 404 F.2d 1097, 1099 (C.A. 6, 1968).

The Sixth Circuit has held that where the employer's illegal interference with its employees' rights causes the union's loss of majority status, "it seems to be well within the NLRB's discretion to seek a remedy which would effectively restore that status quo ante. It seems most unlikely that a simple cease and desist order could be expected to accomplish this result." *N.L.R.B. v. Delight Bakery, Inc.*, 353 F.2d 344, 347 (1965). Accord: *United Steelworkers of America v. N.L.R.B. (Northwest Engineering Co.)*,

[18] The payroll eligibility period used in determining the scope of the bargaining unit at the time of the Union's June 13 demand ended on June 17, after the two additional cards were obtained (A. 743).

126 App. D.C. 215, 217-218, 376 F.2d 770, 772-773 (1967), cert. denied, 389 U.S. 932; *International Union, UAW v. N.L.R.B. (Aero Corp.),* 215 App. D.C. 220, n. 7, 363 F.2d 702, 707, n. 7 (1966), cert. denied, *sub nom. Aero Corp. v. N.L.R.B.*, 385 U.S. 973; *Local No. 152, Int'l Brotherhood of Teamsters v. N.L.R.B. (American Compressed Steel Corp.),* 120 App. D.C. 25, 27, 343 F.2d 307, 309 (1965).

In the present case, nearly every employee in the bargaining unit was subjected to Vice President Darnall's unlawful poll. At least six employees —almost one-sixth of the bargaining unit—were individually threatened that the store would be closed if the Union won the election, and the Company also engaged in considerable unlawful interrogation. In the face of this serious opposition the Union lost the election by only three votes. On the facts before it here, the Board's inference that the Company's illegal conduct had its natural coercive effect was clearly within its province as the primary finder of fact. As this Court stated in *United Steelworkers v. N.L.R.B., supra,* 376 F.2d 770, 774:

> In the particular area of federal regulation of labor relations the courts do not have a charter to insist upon especially strong evidence of violation as a precondition to an affirmative remedy within the Board's jurisdiction. [Citations and footnotes omitted.] In the present case the Board's findings established not only a violation of Section 8(a)(1), but also an interference with the bargaining agent designated by a majority. We are unable to say that it was arbitrary for the Board to conclude that a reasonable vindication of the Act and its purposes is best served by returning these parties to the status quo ante and compelling the Company to commence bargaining.

IV. THE BOARD'S REMEDY WAS VALID AND PROPER

In the instant case, the Board ordered the Company to cease and desist from the unfair labor practices found and from interfering with the Section 7 rights of its employees "in any other manner." The Company was further required to bargain in good faith with the Union as the representative of the employees at its Clarksburg store, and to post appropriate notices at *all* its retail stores.

The Union, in its brief to the Board, urges that "the traditional Board remedies utilized against this employer in the past are inadequate" and that "stronger remedial measures are necessary" (A. 766). The Union requested (1) that the Board issue a "broad cease and desist order" for the Company's 8(a)(5) violation; (2) that the Board direct its General Counsel to treat further unfair labor practice charges against the Company as emergency matters and that he be directed to seek injunctions pursuant to Section 10(j) of the Act whenever he issues a complaint based on such a charge, (3) that the Board require the Company to carry the burden of proving that all future refusals to bargain are in good faith; (4) that the Board order the Company to reimburse the Union for the latter's litigation expenses including attorneys' fees; and (5) that the order to bargain be made retroactive to the date of the Company's first unlawful refusal so that "terms and conditions of employment during this period of litigation will be determined as a mandatory subject of bargaining." (A. 769)

The Union noted that some of the remedial measures it sought were "admittedly unusual" and "extraordinary" (C.P. Br. to Board, p. 15) but urged that the conduct of the Company made them necessary. Without commenting on its power to grant all of the measures sought, the Board denied the Union's request for additional relief, declining "to depart from [its] existing policies with respect to remedial orders" (A. 746, n. 2).

Although the Board has imposed additional remedial measures in a few cases involving special circumstances—for example a massive unlawful employer antiunion campaign—including direct mailings to the employees (*J.P. Stevens & Co., Inc.*, 157 NLRB 869 (1966))—we are aware of no case in which it has granted the relief requested by the Union here.[19]

The Supreme Court has stated that "the relation of remedy to policy is peculiarly a matter for administrative competence" (*Phelps-Dodge Corp. v. N.L.R.B., supra*, 313 U.S. at 194), and accordingly, "it is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged." *International Ass'n of Machinists v. N.L.R.B.*, 311 U.S. 72, 83. Accord, *Fibreboard Paper Products Corp. v. N.L.R.B., supra*, 379 U.S. at 216; *N.L.R.B. v. Seven-Up Bottling Co., supra*, 344 U.S. 344; *Virginia Electric Power Co. v. N.L.R.B.*, 319 U.S. at 540. See also, *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966). Despite this line of cases, the Union asserts the insufficiency of the Board's order, which precludes like or related violations of the Act in addition to other traditional affirmative relief. However, as this Court stated in *Amalgamated Clothing Workers v. N.L.R.B. (Hamburg Shirt Corp.), supra*, 125 U.S. App. D.C. at 281, 371 F.2d at 745: "The Board's power to fashion remedies places a

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[19] See, *H. W. Elson Bottling Co.*, 155 NLRB 714 (1965), modified, 379 F.2d 223, 226-227 (C.A. 6, 1967); *J. P. Stevens & Co., Inc.*, 157 NLRB 869 (1966), modified, 380 F.2d 292 (C.A. 2, 1967), cert. denied, 389 U.S. 1005; *Scott's Inc.*, 159 NLRB 1795 (1966), modified *sub nom. I.U.E. v. N.L.R.B.*, 127 App. D.C. 303, 305-307, 383 F.2d 230, 232-234 (1967), cert. den., 390 U.S. 904; *Crystal Lake Broom Works*, 159 NLRB 429; *Sterling Aluminum*, 163 NLRB No. 40 (1967); *J. P. Stevens Co., Inc.*, 163 NLRB No. 24 (1967), modified *sub nom. Textile Workers Union of America, AFL-CIO v. N.L.R.B.*, 388 F.2d 896, 903 (C.A. 2, 1967); *Marlene Industries*, 166 NLRB No. 58 (1967), mod. *sub nom., Decaturville Sportswear Co. v. N.L.R.B.*, ___ F.2d ___, 70 LRRM 2472, 2474 (C.A. 6, 1969); *J.P. Stevens & Co.*, 167 NLRB Nos. 37, 38, mod., ___ F.2d ___, 70 LRRM 2104, 2109 (C.A. 4, 1968). Cf. *Gotham Industries*, 167 NLRB No. 91 (1967).

premium upon agency expertise and experience, and the broad discretion involved is for the agency and not the court to exercise. We cannot insist that the traditional relief provided here will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law." Accord: *United Hatters v. N.L.R.B.*, 126 U.S. App. D.C. 149, 151, 375 F.2d 325, 327 (1967); *United Steelworkers of America, etc. v. N.L.R.B. (Stanley-Artex)*, ___ U.S. App. D.C. ___, ___ F.2d ___, 69 LRRM 2196, 2199.

As these cases demonstrate, judicial review in this area extends to a determination of whether the Board's remedy is insufficient to remedy the violations found. The issue before the Court is not whether the Union or the Board has proposed the best possible remedy. See, *Amalgamated Clothing Workers v. N.L.R.B. (Edro Corp.), supra*, 345 F.2d at 268. Here, the Board refused to impose novel remedial measures which thus far have been granted only sparingly. The Board was of the view that the traditional remedial provisions would be sufficient in this case. And unless the Board abused its discretion in making this judgment, there is no occasion for reversal.

CONCLUSION

For the reasons given, it is respectfully submitted that the petition for review in No. 22,318 be denied and that the Board's application for enforcement in No. 22,414 be granted.

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